

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 74-2045

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

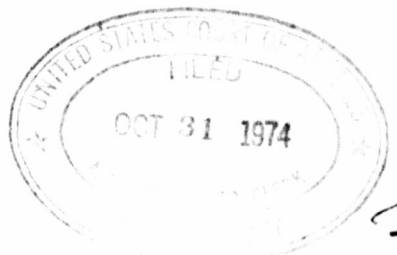
INTERNATIONAL UNION OF OPERATING ENGINEERS  
LOCAL NOS. 17, 17A AND 17B, AFL-CIO,  
RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD.

## APPENDIX

ELLIOTT MOORE,  
*Deputy Associate General Counsel,*  
*National Labor Relations Board,*  
Washington, D. C. 20570.

BATAVIA TIMES, APPELLATE COURT PRINTERS  
A. GERALD KLEPS, REPRESENTATIVE  
BATAVIA, N. Y. 14020  
716-343-0457



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(Not Printed.)

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Exhibit 3—Rough sketch of the Squaw Island work site.

Marked for identification at page 39.

Exhibit 4—Document. Marked for identification at page 60.



## **Chronological List of Relevant Docket Entries.**

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In the Matter of:

INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL NO. 17,  
17A AND 17B, AFL-CIO.

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Case No.: 3-CC-809.

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- 10.16.73 Charge filed.
- 11. 1.73 Complaint and Notice of Hearing, dated.
- 11. 8.73 Respondent's Answer, received.
- 11.19.73 Hearing Opened.
- 11.20.73 Hearing Closed.
- 1.14.74 Administrative Law Judge's Decision issued.
- 2. 6.74 Respondent's Exceptions to Administrative Law Judge's Decision and Recommendation, received.
- 2.11.74 General Counsel's Cross Exceptions to the Administrative Law Judge's Decision, received.
- 4.19.74 Decision and Order of the National Labor Relations Board, dated.

**Administrative Law Judge's Decision.**

UNITED STATES OF AMERICA  
Before the National Labor Relations Board  
Division of Judges  
Washington, D. C.

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INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL NO. 17, 17A and  
17B, AFL-CIO,

and

FIRELANDS SEWER AND WATER  
CONSTRUCTION CO., INC.

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January 14, 1974  
Case No. 3-CC-809

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Francis J. Novak, Jr., Esq., for the General Counsel.

Richard Lipsitz, Esq. (Lipsitz, Green, Fahringer, Roll,  
Schuller & James), of Buffalo, New York, for the Respon-  
dent.

Daniel T. Roach, Esq., of Buffalo, New York, for the  
Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

THOMAS D. JOHNSTON, Administrative Law Judge: This  
case was heard at Buffalo, New York, on November 19 and



*Administrative Law Judge's Decision.*

20, 1973<sup>1</sup> pursuant to a charge filed on October 16 by Firelands Sewer and Water Construction Co., Inc. (herein referred to as Firelands) and a complaint issued on November 1.

The complaint alleged that the International Union of Operating Engineers Local No. 17, 17A and 17B, AFL-CIO (herein referred to as the Respondent) violated Section 8 (b) (4) (i) and (ii) (B) of the National Labor Relations Act, as amended (herein referred to as the Act), by threatening the Buffalo Sewer Authority (herein referred to as the Authority) it would strike and/or picket if the Authority awarded Firelands a contract; ordered, instructed, requested and appealed to the employees of the Authority, Dunbar and Sullivan Dredging Co. (herein referred to as Dunbar). Herbert F. Darling, Inc. (herein referred to as Darling) and other neutral persons to cease work at Squaw Island; and by unlawfully picketing-at Squaw Island<sup>2</sup> with an object of forcing or requiring the Authority, Dunbar, Darling and other neutral persons to cease using, selling, handling, transporting, or otherwise dealing in the products of and to cease doing business with Firelands.

Respondent in its answer filed on November 8 denied having violated the Act.

The issues involved are whether the Respondent violated Section 8 (b) (4) (i) and (ii) (B) of the Act by threatening the Authority; inducing employees of neutral or secondary persons to cease work, and by picketing at Squaw Island for the proscribed object alleged.

<sup>1</sup> All dates referred to are in 1973 unless otherwise stated.

<sup>2</sup> The picketing conducted by Respondent at Tift Street Farms where Firelands as part of its contract with the Authority was also performing work was not alleged to be unlawful.

*Administrative Law Judge's Decision.*

The parties at the hearing were afforded the opportunity to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally on the record and to submit briefs.

Upon the entire record in this case and from my observation of the witnesses and after due consideration of the briefs filed by the General Counsel and Respondent<sup>3</sup> I hereby make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS of the EMPLOYERS

Firelands, with its principal office and place of business located in Ohio, is engaged in the construction industry. During the 12 month period preceding November 1, Firelands, in the course of its operations, performed services valued in excess of \$50,000 in states outside the State of Ohio.

The Authority, operates and maintains a sewage and water treatment disposal facility for the City of Buffalo, New York, which is located at Squaw Island.

Dunbar, with its principal office and place of business located at Dearborn, Michigan, is engaged in the business of dredging and building docks.

Darling with its principal office and place of business located at Williamsville, New York, is engaged in business as an engineering contractor in the construction industry.

Firelands has a contract with the Authority, valued at approximately 10.4 million dollars, for the removal of decomposed garbage from the Authority's waste facility located at Squaw Island. Firelands in connection with this contract awarded Dunbar a contract for the construction of a dock at

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<sup>3</sup> The Charging Party did not submit a brief.

*Administrative Law Judge's Decision.*

Squaw Island and Dunbar awarded Darling a contract for the pile-driving work to be performed in constructing the dock.

Respondent admits, and I find that Firelands, Dunbar, Darling and the Authority<sup>1</sup> are employers and/or persons engaged in commerce within the meaning of Section 2(6) and (7) and Section 8 (b) (4) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find that the International Union of Operating Engineers Local No. 17, 17A and 17B, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Respondent's Threat Made to the Authority*

Gillman Laehy, who is the General Manager of the Authority, testified in December 1972 the Authority opened bids for the site preparation of a secondary treatment plant to be constructed on Squaw Island (herein referred to as the Squaw Island jobsite) which involved removal of approximately 2 million yards of solid waste material from Squaw Island to a disposal site located approximately 6 or 7 miles distance at Tiffit Street Farms. After the contract was rebid in June it was awarded by the Authority to Firelands which was the lowest responsible bidder.

Thomas McPartlan, who is the Business Representative of Respondent, stated after learning in June that Firelands who worked as an open shop contractor in other areas was the low bidder on the job he had a meeting arranged through the Buffalo AFL-CIO Council with the Authority. George Wessel,

<sup>1</sup> Public employers are "persons" protected from secondary activity within the meaning of Section 8 (b) (4) of the Act. Local No. 16, *International Longshoremen and Warehousemen's Union (City of Juneau)* 176 NLRB 889.

*Administrative Law Judge's Decision.*

who is the President of the Buffalo AFL-CIO Council testified he arranged the meeting.

This meeting at which awarding the contract to Firelands was discussed was held on July 11, and was attended by representatives of the Authority and various labor organizations including Respondent.

General Manager Laehy stated during the meeting there was a discussion concerning why the Authority would employ an open shop contractor rather than a union contractor whereupon it was explained that the Authority because of the funding involved, including the use of federal funds had no choice but to award the contract to the lowest responsible bidder which was Firelands. Laehy testified about the middle of the meeting which lasted approximately 1-1/2 to 2 hours he heard Respondent's Business Representative McPartlan make the statement if they proceeded to engage Firelands as the contractor for the job his union would go on strike. Laehy's response was it seemed to him that wasn't legal because they had followed the procedure for letting the contract to the letter of the law and had no choice except to give it to the lowest responsible bidder which was Firelands. Laehy, however, did not testify concerning what conversation immediately preceded McPartlan's alleged remark and under cross examination expressed uncertainty whether McPartlan had used the word strike or picketing. Although at least four other representatives of the Authority were present during this meeting none of them testified.

Business Representative McPartlan denied having stated his union would go on strike. His version was he told the Authority if the contract was awarded to Firelands his union would engage in an informational picket.

According to McPartlan this statement was made following a discussion about what effect awarding the first phase of the

*Administrative Law Judge's Decision.*

job to an open shop or nonunion contractor would have on future phases of the job and the representatives of the various unions present being asked by someone what their unions intended to do. McPartlan further stated when someone questioned the legality of informational picketing he expressed it was legal. While McPartlan claimed he did not know whether the Authority's contract with Firelands had been signed he acknowledged it was discussed at the meeting that Firelands was the lowest responsible bidder.

Other union representatives present at the meeting including President Wessel of the Buffalo AFL-CIO Council, Daniel Vujakovich, who is Business Agent of Iron Workers Local 6 and John Kelleher who is Business Representative of Asbestos Local 4 substantially corroborated McPartlan's testimony that he didn't mention a strike but said if Firelands was awarded the contract there would be an informational picket line put up.

I credit Business Representative McPartlan's testimony which was substantially corroborated by President Wessel, Business Agent Vujakovich and Business Representative John Kelleher rather than the uncorroborated testimony of General Manager Laehy who expressed uncertainty in his own testimony and find that McPartlan informed the Authority if Firelands was awarded the contract his union would engage in an informational picket.

*B. Respondent's Picketing at the  
Squaw Island jobsite*

Squaw Island<sup>5</sup> is an island separated from the mainland by the Black Rock Channel (herein referred to as the channel) which runs north and south and was estimated to be approximately 300 feet wide. Access to Squaw Island from the

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<sup>5</sup> The southern part of the island was formerly called Bird Island.

*Administrative Law Judge's Decision.*

mainland may be obtained by two bridges which are located approximately three-fourths of a mile apart.

The bridge at the north end of the Island is the International Railroad Bridge which has a road called the Authority's Access Road (herein referred to as the Access Road). The Bridge at the south end of the Island is the West Ferry Bridge (herein referred to as the Ferry Bridge). On the island itself and running parallel with and adjacent to the Channel there is a road which runs between the two bridges. Along this road between the two bridges but closer to the Ferry Bridge is located a building belonging to the Authority which has a gate that controls the use of the road (herein referred to as the Authority's Gate).<sup>6</sup>

Firelands, whose employees are not represented by any labor organization, began work on the Squaw Island jobsite about September 1. According to Firelands Project Superintendent Gillum the process to be employed for removing the waste material from Squaw Island to Tifft Street Farms was to load the waste material at Squaw Island by conveyors onto barges which would then transport the waste material to a dock located approximately 6 miles south where it would be unloaded with clam buckets into trucks to be transported to and disposed of in a sanitary land fill.

On October 9 Respondent began picketing at the Squaw Island jobsite with picket signs captioned:

Employees of Firelands Sewer and Water Construction Company, Inc. are employed to perform Operating Engineers work on this job under wage and other conditions of employment inferior to those enjoyed by em-

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<sup>6</sup> This gate is normally open during the week except for the weekends when it is sometimes closed.

*Administrative Law Judge's Decision.*

ployees represented by the Operating Engineers Local 17, 17A, 17B, affiliated with the AFL-CIO.<sup>7</sup>

The picket lines were established at the entrance to the Access Road on the mainland side of the channel and on Squaw Island itself at the Authority's Gate.

When the picketing began and throughout the course of the picketing, Firelands employees, who used both the Access Road and the road through the Authority's Gate for ingress and egress to their work area on the Squaw Island jobsite were performing work only in the area of a dock being constructed by the channel between the Authority's Gate and the Access Road. The location of this worksite was estimated by Firelands' Project Superintendent Gillum to be approximately 3000 feet north of the Ferry Bridge towards the International Railroad Bridge.

Dunbar, whose employees are represented by Local 18, which is the marine branch of the Operating Engineers Union, had a contract with Firelands to construct a dock at Squaw Island and to haul barge material from Squaw Island to Tifft Street Farms. Dunbar began work on the Squaw Island jobsite on the afternoon or evening of October 9 at which time using tugboats it bought two barges containing pile-driving equipment up the Channel and moored them along the bank on Squaw Island just north of Ferry Bridge. The overall length of this moored equipment was estimated by Dunbar's Representative Headley to be approximately 260 feet and Headley and Firelands' Project Superintendent Gillum estimated the barges were moored approximately 200 feet south of the Authority's Gate towards the Ferry Bridge. One barge contained a derrick with Dunbar's name on it. Both Firelands' Project Superintendent Gillum and Dunbar's

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<sup>7</sup> Respondent since September 25 had been picketing Tifft Street Farms with identical picket signs where Firelands was also performing work under its contract with the Authority.

*Administrative Law Judge's Decision.*

representative Albert Headley estimated the distance from where these barges were moored to the area north where Firelands employees were working on the Squaw Island jobsite to be approximately 2500 feet. Respondent offered no evidence to dispute their testimonies concerning the distances which I credit.

Dunbar's representative Headley testified on October 10 it had planned to pick up Darling's employees and to move the barges from their mooring site directly across the Channel to the mainland side where Darling was located, pick up pilings and proceed to the proposed docksite to begin driving pilings. Darling's contract with Dunbar was to furnish personnel and supply and drive the pilings. Darling's representative Roy Shafer corroborated Headley's testimony concerning the proposed plan which I credit.

Dunbar's representative Headley testified on October 9 the pickets were picketing within 50 feet of the Authority's Gate. However early on the morning of October 10 he observed some of the pickets moved from the area of the Authority's Gate about 200 feet south along the road towards the Ferry Bridge to where they began picketing on the road about 5 feet from and adjacent to where Dunbar's barges were moored.\* Both Firelands' Project Superintendent Gillum and Darling's representative Roy Shafer corroborated Headley's testimony that on October 10 Respondent began picketing on the road adjacent to the barges. Respondent's Business Representative McPartlan acknowledged on October 9 the pickets were picketing closer to the Authority's Gate and did not deny the picketing was thereafter conducted adjacent to the barges.

Headley testified Dunbar's employees who worked aboard the barges drove their vehicles across the Ferry Bridge where

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\* Respondent had not been prohibited from picketing at the Authority's Gate.



*Administrative Law Judge's Decision.*

they parked and boarded the barges at the mooring site having to cross the picket lines.

On the morning of October 10 Respondent also began picketing in the Channel using two picket boats containing identical picket signs as those picket signs used on land.<sup>9</sup>

According to McPartlan the pickets on the picket boats were instructed to conduct their picketing activities in the channel area between the Ferry Bridge and the International Railroad Bridge. Darling's jobsite was located on the mainland directly across the channel from where Dunbar's barges were moored. Its employees entered their jobsite through a gate with a sign designating the gate was to be used exclusively by Darling's employees.

Darling's Representative Shafer testified on the morning of October 10 which was the day his company was to begin work on the job he observed Respondent's Business Manager Chaffee walk across the Ferry Bridge from Squaw Island through Darling's gate to its jobsite where he had a discussion with Darling's employees. Shafer did not hear what was said. Shafer then observed Chaffee who had a picket sign with the wording concealed leave the work area, flip the picket sign over exposing its caption to those persons who faced him<sup>10</sup> and return to where the pickets were situated on Squaw Island.

While Business Manager Chaffee did not testify and the incident was undenied since the evidence does not establish what was discussed or that Shafer engaged in picketing on that occasion no finding is made with respect to this incident.

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<sup>9</sup> Business Representative McPartlan had made arrangements for obtaining the picket boats several days earlier.

<sup>10</sup> The evidence does not establish whether Darling's employees could observe the caption on the picket sign carried by Chaffee when he flipped the sign over.

*Administrative Law Judge's Decision.*

Both Shafer and Dunbar's Representative Headley testified they observed two picket boats picketing that morning between Dunbar's barges and the mainland and between Ferry Bridge and the docksite. Headley stated when Dunbar's employees crossed the channel that morning in a rowboat to pick up Darling's employees and transport them back across the channel to Dunbar's barges, Darling's employees refused to enter the rowboat. Headley stated while they were attempting to pick up Darling's employees the picket boats were picketing between Dunbar's barges and the east bank of the channel where they were attempting to pick them up.

Respondent did not deny the picketing was conducted in the channel area where Dunbar and Darling were attempting to work which would have been included in the area where McPartlan had instructed them to picket.

Darling's representative Shafer stated after leaving his jobsite that morning he was informed his men had refused to go to work that day.

Shafer testified that from October 10 to about October 19 when Dunbar's barges were removed that although his employees reported to their jobsite every morning they refused to perform any work. On each of these occasions Shafer observed the picket boats picketing in the Channel area between Dunbar's barges and the mainland where his employees were located as well as between the Ferry Bridge and the International Railroad Bridge. Shafer testified after his company was unable to perform any work pursuant to its contract with Dunbar its contract was rescinded.

Although Darling's employees did not testify Shafer stated the only reason given by them for refusing to work was because they couldn't cross the picket line.

Since Darling's employees reported to work each day and except for the picketing which was being conducted by the

*Administrative Law Judge's Decision.*

picket boats in the area where they were to perform their work with no other reason given by them for their refusal to work, I find such refusal resulted from the picketing.

Dunbar's representative Headley testified Respondent continued to picket adjacent to Dunbar's barges from October 10 to October 19 at which time the barges were removed by Dunbar because they were unable to get personnel to come aboard the barges to proceed with the work. Headley stated on several occasions he saw a picket boat tied to Dunbar's barge and on one occasion when he was aboard a barge he saw pickets on the barge itself. Under cross examination Headley acknowledged he did not ask the pickets aboard the barge to leave or unmoor their boat and was informed on one occasion they had coffee aboard the barge.

Firelands' Project Superintendent Gillum corroborated Headley testimony that the picketing continued adjacent to the Dunbar's barges from October 10 through October 19 and that on one occasion he observed a picket boat tied to Dunbar's barge.<sup>11</sup>

Respondent's Business Representative McPartlan did not deny that during this period the picketing was conducted adjacent to Dunbar's barges. While he acknowledged he had observed the picket boat moored to the barge and had observed pickets aboard the barge he denied they were actually picketing on the barge itself but were instead crossing the barge to get fuel for the picket boat. According to McPartlan and one of the pickets using the picket boat, James Mann, Respondent used a docking area south of where the barges were moored to refuel the picket boats, obtain supplies and change crews. Mann testified the only place they would refuel was by using stairs located by the Ferry Bridge.

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<sup>11</sup> Headley's testimony is unclear whether he actually observed pickets aboard the barges.

*Administrative Law Judge's Decision.*

Based upon the above evidence I find that Respondent from October 10 until the barges were removed about October 19, conducted picketing on the road adjacent to Dunbar's barges. Assuming picketing did occur aboard the barges themselves in view of the evidence I find this to be an isolated incident. With respect to these occasions on which the picket boats were moored to the barges the evidence does not establish whether the picket boats were either manned or displayed picket signs.

Dunbar's Representative Headley testified on three occasions in November when his company's tugboat which was identified with the Dunbar's name was proceeding up the channel to perform work at the docksite where Firelands' employees were working it was turned back because of the picket boat. Headley stated the first occasion occurred on November 14 when his tugboat was proceeding to the Squaw Island jobsite to move some equipment. As the tugboat proceeded up the channel through the Ferry Bridge it encountered a picket boat approximately 200 feet north of the Ferry Bridge. Headley first observed the picket boat while the tugboat was approximately 800 feet south of the Ferry Bridge as the picket boat was proceeding from the area where Dunbar's barges had been previously moored towards the center of the channel.

Headley stated while the tugboat captain, who refused to proceed upon encountering the picket boat, was in the process of turning the tugboat around he engaged one of the two pickets in the picket boat subsequently identified as James Mann in a conversation. Headley's version was he asked Mann if there was a picket line and Mann nodded affirmatively. Headley asked who they were picketing and Mann replied "Firelands." Headley stated he then explained they were a bona fide union company with union personnel and asked Mann if he was picketing them whereupon Mann

*Administrative Law Judge's Decision.*

replied "Yes sir." According to Headley during the conversation the picket boat was approximately 75 feet from the tugboat. Under cross examination Headley was uncertain whether he had asked were they picketing "us" or "this company."

James Mann testified on November 14 he and Harry Gerlach were in the picket boat which was moving east and west in the channel when he observed Dunbar's tugboat come through the bridge. According to Mann they had just refueled the picket boat and gotten out in the channel before seeing the tugboat.<sup>12</sup> Mann stated as they turned the picket boat around to get out of the way of the tugboat a man on the tugboat asked were they picketing union contractors saying they were a bona fide union contractor. Mann's response was "No, I'm picketing Firelands." Mann believed either he or Gerlach pointed to the picket sign. Mann who stated he had no trouble hearing the man's voice denied hearing the man on the tugboat ask if he was picketing them or his company and denied having said they were picketing Dunbar.

Harry Gerlach, who is a member of Respondent and was in the picket boat with Mann on November 14 stated after refueling the picket boat and starting out in the channel they saw the tugboat coming up the channel. On direct examination Gerlach testified the only words of the conversation between Mann and the man of the tugboat he remembered were the last ones by someone on the tugboat asking "Are you picketing a bona fide union company" or "outfit" or something and Mann replying "No, we're picketing Firelands."

However under cross examination Gerlach who acknowledged he did not overhear the entire conversation because he had been having trouble with the motor and because of the noise of the tugboat, admitted he was uncertain

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<sup>12</sup> Mann stated they had been picketing in the channel that day in the direction north and south as well as east and west.

*Administrative Law Judge's Decision.*

whether he had heard the question about whether they were picketing a bona fide union company or outfit as he had testified to on his direct examination.

Gerlach also admitted, contrary to Mann's testimony, that the reason they proceeded into the channel upon seeing the tugboat was to be sure the tugboat would see their picket signs.<sup>13</sup>

I credit the testimony of Headley who impressed me as being a more credible witness than Mann and find that pursuant to Headley's inquiry Mann had informed him they were picketing his company.<sup>14</sup> Apart from my observation of the witnesses Gerlach not only failed in his attempt to corroborate Mann's testimony but contradicted him by his testimony concerning the reason they had proceeded into the channel upon seeing Dunbar's tugboat.

Headley stated on November 16 while he was on the dock where Firelands' employees were working he observed Dunbar's tugboat proceeding north towards the dock. When the tugboat was approximately 400 feet from the dock he saw the picket boat which was located approximately 50 to 100 feet north of the dock proceeding south down the channel, subsequently turn and position itself about halfway between the dock and the tugboat whereupon the tugboat turned around and proceeded south back down the channel. The evidence does not establish exactly how close the picket boat was from the dock when it actually turned in front of the tugboat.

<sup>13</sup> Although Gerlach was cross-examined about what instructions he had received for picketing, the form of the question which also asked about his own intentions rendered his answer on this point unclear.

<sup>14</sup> A tape recording of the conversation between Headley and Mann which was made by Headley at the time the incident occurred and offered as evidence by the General Counsel for the purpose of impeaching Mann's testimony, the sounds of which I find are not clearly audible, had not been considered in making this credibility resolution.

*Administrative Law Judge's Decision.*

James Mann who stated he was in the picket boat on November 16 acknowledged positioning the picket boat between the dock and the tugboat but claimed he did so to get out of the way of the tugboat which had been preceded by a freighter coming up the channel. According to Mann when the incident occurred the picket boat was picketing in the area of the dock where Firelands' employees were using a crane on one barge to unload stone from another barge in the channel.

Headley testified on November 17 Dunbar's tugboat was proceeding north up the channel headed for the dock and upon approaching the Ferry Bridge he observed the picket boat with Business Representative McPartlan aboard coming out from the bank of the channel proceeding towards the center of the channel about the same time they were coming through the Ferry Bridge whereupon the tugboat captain turned the tugboat around and proceeded south back out of the channel.

McPartlan testified on that occasion they were proceeding north about the center of the channel going in the same direction as the tugboat. However, under cross examination McPartlan acknowledged that prior to this incident the picket boat had been docked at Squaw Island to get fuel and change people and as they proceeded into the channel he did not see the tugboat.

According to Firelands' Project Superintendent Gillum the work performed by Firelands' employees at the dock which dock has since been completed included unloading equipment, assembling conveyors and mounting the conveyors on the dock preparatory to loading barges. Gillum denied Firelands used the channel for performing its work including moving equipment or employees.

Both Dunbar's representative Headley and Darling's representative Shafer denied Fireland's employees ever performed any work in the vicinity of their employees or Dunbar's barges or tugboats.

*Administrative Law Judge's Decision.*

Business Representative McPartlan while observing attempts by Dunbar and Darling to use the channel acknowledged that no Firelands' employees had either worked in the vicinity of Dunbar's barges or used the channel. According to McPartlan by picketing at the Authority's Gate and the Access Road they would be able to reach all of Firelands' employees getting onto the jobsite.

McPartlan asserted as his reason for utilizing the picket boats was because of the possibility Firelands might use the channel as an access route. While McPartlan claimed it was never their intention or desire by picketing in the channel to prevent employees of Dunbar or Darling from working he admitted he knew it had that effect.

While McPartlan testified the picketing was conducted for informational purposes under cross examination he acknowledged he did not know what kind of wages or benefits Firelands' employees were receiving nor had he investigated such matter.

The picketing at the Squaw Island jobsite was still continuing at the time the hearing was held. However, with respect to the picketing conducted in the channel only one picket boat has been used since about October 23.

*C. Analysis and Conclusions*

The General Counsel contends while Respondent denies that the Respondent violated Section 8 (b) (4) (i) and (ii) (B) of the Act<sup>15</sup> by unlawfully threatening the Authority it would

<sup>15</sup> Section 8 (b) (4) of the Act makes it an unfair labor practice for a union:

(i) to engage in, or to induce or encourage any individual . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services;

(Footnote continued on following page)



*Administrative Law Judge's Decision.*

strike or picket if Firelands was awarded the contract; unlawfully inducing employees of neutral or secondary persons to cease work; and by unlawfully picketing the Squaw Island jobsite. Respondent asserts as its defense the picketing was for informational purposes and therefore lawful.

The findings, *supra*, concerning the threat established Respondent's Business Representative McPartlan at the July 11 meeting informed the Authority's representatives if Firelands, a nonunion contractor which was the lowest responsible bidder, was awarded the contract his union would engage in an informational picket. Inasmuch as this threat to the Authority to keep it from awarding the contract to Firelands was by its terms unrestricted in scope and contemplated picketing the entire jobsite including future phases and any employers working there, I find that it constituted a threat within the meaning of Section 8 (b) (4) (ii) (B) of the Act. See *United Brotherhood of Carpenters and Joiners of America AFL-CIO, Local No. 639 (American Modulars Corporation)*, 203 NLRB No. 162.

Absent evidence and findings of any inducement other than the picketing itself the remaining issue is whether the subsequent picketing conducted at the Squaw Island jobsite was also unlawful.

The undisputed evidence established Respondent's primary dispute was with Firelands, a nonunion contractor, rather

(Footnote continued from preceding page)

or (ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is:

\* \* \* \* \*

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . : *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

*Administrative Law Judge's Decision.*

than with the Authority or the other contractors including Dunbar and Darling which were also performing work at the Squaw Island jobsite.

The Board in *Moore Dry Dock*<sup>16</sup> set forth the following criteria to serve as a guide in determining whether picketing a primary employer at a common situs as here, violates Section 8 (b) (4) (B) of the Act: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

These standards are not to be applied on an indiscriminate "per se" basis but regarded merely as aids in determining whether a violation has occurred. *International Brotherhood of Electrical Workers, Local Union 861 (Plauche Electric, Inc.)*, 135 NLRB 250, 255. In applying these standards the controlling consideration is to require that the picketing be conducted so as "to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." *Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market)*, 116 NLRB 856, 859, enfd. 249 F. 2d 591 (C.A. 9).

Respondent's contention the *Moore Dry Dock* standards are inapplicable here because its picketing at Tifft Street Farms was not alleged to be unlawful is rejected. The fact picketing conducted at more than one location may not be unlawful at some locations would not preclude finding it to be unlawful at a given location.

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<sup>16</sup> *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547, 549.

*Administrative Law Judge's Decision.*

Applying the *Moore Dry Dock* standards to the picketing conducted at the Squaw Island jobsite the findings, *supra*, established that Respondent, while initially picketing at the Access Road and in the immediate vicinity of the Authority's Gate which entrances were used by Firelands' employees for ingress and egress to its worksite, thereafter beginning on October 10 extended and maintained its picketing on the road adjacent to Dunbar's barges where Dunbar's employees boarded the barges to work and utilized picket boats to picket in the channel area where the employees of Dunbar and Darling were attempting to use the channel to perform their work notwithstanding the fact Firelands' employees who did not use the channel in performing their work were at all times during such picketing confined to a worksite located at a distance of approximately 2500 feet away. As a result of such picketing the employees of Darling and Dunbar were unable to perform their work and Darling's contract with Dunbar was rescinded.

Clearly such picketing, which was not reasonably limited to places close to the worksite where Firelands was performing its work, failed to comply with the *Moore Dry Dock* standard that the picketing be limited to places reasonably close to the location of the situs.

Apart from the manner in which the picketing was conducted other evidence bearing on Respondent's true objective included the statement by Respondent's picket James Mann to Dunbar's representative Headley, while Dunbar's tugboat was attempting to use the channel, that the picketing was against his company in addition to the prior unlawful threat to the Authority to picket if it awarded the contract to Firelands.

Respondent by its conduct herein found rather than seeking to insulate those employers including the Authority, Dunbar and Darling with whom Respondent had no dispute instead deliberately enmeshed them in its dispute with Firelands.

*Administrative Law Judge's Decision.*

Under these circumstances, I find, that Respondent by its threat to picket and by picketing the Squaw Island jobsite intended thereby to induce or encourage employees of Dunbar, Authority, and Darling to strike or engage in a refusal to perform services for their respective employers and threatened, coerced and restrained Dunbar, Authority and Darling with an object of forcing Dunbar and the Authority to cease doing business with Firelands and forcing Darling to cease doing business with Dunbar in order to force or require Dunbar, in turn, to cease doing business with Firelands, thereby violating Section 8 (b) (4) (i) and (ii) (B) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR  
PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of those employers described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. Firelands Sewer and Water Construction Co., Inc., Dunbar and Sullivan Dredging Co., Herbert F. Darling, Inc. and the Buffalo Sewer Authority are employers or persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2 (6) and (7) and Section 8 (b) (4) of the Act.

2. Respondent, International Union of Operating Engineers Local No. 17, 17A and 17B, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By threatening the Buffalo Sewer Authority with a picket line if Firelands Sewer and Water Construction Co.,

*Administrative Law Judge's Decision.*

Inc. was awarded the contract in furtherance of its dispute with Firelands Sewer and Water Construction Co., Inc., Respondent has engaged in unfair labor practices within the meaning of Section 8 (b) (4) (ii) (B) of the Act.

4. By engaging in picketing at the Squaw Island jobsite inducing and encouraging individuals employed by Dunbar and Sullivan Dredging Co., and the Buffalo Sewer Authority to engage in a strike or refusal in the course of their employment to perform services, and by coercing or restraining Dunbar and Sullivan Dredging Co., Herbert F. Darling, Inc., and the Buffalo Sewer Authority with an object of forcing or requiring Dunbar and Sullivan Dredging Co., and the Buffalo Sewer Authority to cease doing Business with Firelands Sewer and Water Construction Co., Inc., and forcing or requiring Herbert F. Darling, Inc., to cease doing business with Dunbar & Sullivan Dredging Co., in order to force or require Dunbar and Sullivan Dredging Co., in turn, to cease doing business with Firelands Sewer and Water Construction Co., Inc., Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (i) and (ii) (B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) and Section 8 (b) (4) of the Act.

#### V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8 (b) (4) (i) and (ii) (B) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

The Remedy proposed by General Counsel for the removal of all picketing from the jobsite which would infringe upon

*Administrative Law Judge's Decision.*

Respondent's right to engage in lawful primary picketing is rejected.

Upon the foregoing findings of fact, conclusions of law and the entire record and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:<sup>17</sup>

**ORDER**

Respondent, International Union of Operating Engineers Local No. 17, 17A and 17B, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging, individuals employed by Dunbar and Sullivan Dredging Co., Herbert F. Darling, Inc., and the Buffalo Sewer Authority, or by any other person engaged in commerce or an industry affecting commerce to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or perform services for their respective employers; and from threatening, coercing, or restraining the Buffalo Sewer Authority, Dunbar and Sullivan Dredging Co., Herbert F. Darling, Inc., or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require the Buffalo Sewer Authority, Dunbar and Sullivan Dredging Co., or any other person to cease doing business with Firelands Sewer and Water Construction Co., Inc., or to

<sup>17</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

*Administrative Law Judge's Decision.*

force or require Herbert F. Darling, Inc. to cease doing business with Dunbar and Sullivan Dredging Co., in order to force or require Dunbar and Sullivan Dredging Co., in turn, to cease doing business with Firelands Sewer and Water Construction Co., Inc.

(b) In any manner, or by any means, including threats to picket, picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted or by any like or related acts or conduct by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Dunbar and Sullivan Dredging Co., the Buffalo Sewer Authority and Herbert F. Darling, Inc., or by any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service or in any manner, or by any means, threatening, coercing, or restraining Dunbar and Sullivan Dredging Co., the Buffalo Sewer Authority and Herbert F. Darling, Inc., or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Dunbar and Sullivan Dredging Co., the Buffalo Sewer Authority or any person to cease doing business with Firelands Sewer and Water Construction Co., Inc., or to force or require Herbert F. Darling, Inc., to cease doing business with Dunbar and Sullivan Dredging Co., in order to force or require Dunbar and Sullivan Dredging Co., in turn, to cease doing business with Firelands Sewer and Water Construction Co., Inc.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

*Administrative Law Judge's Decision.*

(a) Post at Respondent's business office, hiring halls, meetings halls, and other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."<sup>18</sup> Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by a duly authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 3 for posting by the employers named above, if they are willing, at all places where notices to their respective employees are customarily posted.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated at Washington, D. C.

THOMAS D. JOHNSTON,  
*Administrative Law Judge.*

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<sup>18</sup> In the event the Board's Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."



*Appendix Attached to Administrative Law  
Judge's Decision.*

APPENDIX.

(Seal)

NATIONAL LABOR RELATIONS BOARD

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT induce or encourage, by threats to picket, by picketing, or any other means, individuals employed the Buffalo Sewer Authority, Dunbar and Sullivan Dredging Co., Herbert F. Darling, Inc., or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of their employment to perform any services for their employers, nor will we threaten, coerce, or restrain the above-named Employers, or any other person, where an object thereof is to force or require the Buffalo Sewer Authority, Dunbar and Sullivan Dredging Co., or any other person to cease doing business with Firelands Sewer and Water Construction Co., Inc., or to force or require Herbert F. Darling, Inc. to cease doing business with Dunbar and Sullivan Dredging Co. in order to force or require Dunbar and Sullivan Dredging Co., in turn, to cease doing business with Firelands Sewer and Water Construction Co., Inc.

INTERNATIONAL UNION OF OPERATING

ENGINEERS LOCAL NO. 17, 17A

17B, AFL-CIO

(Labor Organization)

By .....

(Representative) (Title)

Dated .....

*Board's Decision and Order.*

**THIS IS AN OFFICIAL NOTICE AND MUST NOT  
BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9th Floor—Federal Building 111—West Huron Street, Buffalo, N. Y. 14202 (Tel. No. 716-842-3100).

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**Board's Decision and Order.**

**UNITED STATES OF AMERICA**

**Before the National Labor Relations Board**

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**INTERNATIONAL UNION OF OPERATING ENGINEERS  
LOCAL NO. 17, 17A AND 17B,  
AFL-CIO,**

**and**

**FIRELANDS SEWER AND WATER CONSTRUCTION  
CO., INC.**

---

**Case 3—CC—809**

**April 19, 1974**

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**DECISION AND ORDER**

On January 14, 1974, Administrative Law Judge Thomas D. Johnston issued the attached Decision in this proceeding.

*Board's Decision and Order.*

Thereafter, the Respondent filed exceptions and a brief in support thereof and the General Counsel filed limited exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as herein modified, and to adopt his recommended Order.

The record discloses and the Administrative Law Judge found that a meeting had been arranged with the Buffalo Sewer Authority for July 11, 1973, to discuss the Authority's award of a contract to Firelands Sewer and Water Construction Co., Inc., a nonunion contractor with which Respondent had its primary dispute. The Authority informed the representatives of the various unions at the meeting that Firelands was the lowest responsible bidder. According to Respondent's business representative, Thomas McPartlan, whose testimony about the meeting was credited by the Administrative Law Judge, someone asked the union representatives what their local unions intended to do. McPartlan replied that if Firelands were awarded the contract, the Respondent would engage in informational picketing.

The Administrative Law Judge, citing *United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 639 (American Modulars Corporation)*, 203 NLRB No. 162, concluded that McPartlan's statement constituted a threat within the meaning of Section 8 (b) (4) (ii) (B) of the Act inasmuch as it was "by its terms unrestricted in scope and contemplated picketing the entire jobsite including future phases and any employer working there." We do not agree.

*Board's Decision and Order.*

In *American Modulares Corporation* respondent union, when several neutral contractors were working at the jobsite, threatened to engage in "informational picketing of the Sherwood Acres jobsite." The Board found, "This statement, by its breadth, contemplated picketing of the entire jobsite and anyone working there, wheiner connected with the primary or neutral persons or employers." Unlike the situation in *American Modulares Corporation*, McPartlan's statement was not a threat to picket neutral contractors who were or would in the future be working at the jobsite. To find that the statement was a general threat to picket neutrals is to disregard the context in which the statement was made. Discussion at the meeting had centered on Firelands; no contracts other than the one to Firelands had been let; no other contractors or subcontractors were at the time involved in the contracted work or talked about at the meeting; and McPartlan was responding to a question as to what Respondent would do. In these circumstances, McPartlan's statement, although not specific, is reasonably construed as threatening to picket Firelands. A threat made to a contractor to engage in informational picketing against a subcontractor with which a union has a primary dispute is not a threat to engage in proscribed activity but rather is the mere giving of notice of prospective picketing against a subcontractor of the general contractor. Such is the case here.

For the above reasons, we find that McPartlan's statement at the July 11, 1973, meeting with the Buffalo Sewer Authority is not violative of Section 8 (b) (4) (ii) (B) of the Act. Since we are adopting the Administrative Law Judge's finding that the Respondent engaged in unlawful picketing which violates both clauses (i) (ii) of Section 8 (b) (4) (B) of the Act, the remedy remains the same. Accordingly, we shall adopt the Administrative Law Judge's recommended Order *in toto*.

*Board's Decision and Order.***ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, International Union of Operating Engineers Local No. 17, 17A and 17B, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.

HOWARD JENKINS, JR., *Member,*  
JOHN A. PENELLO, *Member,*  
*National Labor Relations Board.*

(Seal)

MEMBER KENNEDY, dissenting in part:

I agree with the majority's adoption of the Administrative Law Judge's finding that Respondent violated Section 8 (b) (4) (i) and (ii) (B) of the Act by its picketing at the Squaw Island jobsite. I disagree with the majority's reversal of his related finding that Respondent violated Section 8 (b) (4) (ii) (B) by threatening the Buffalo Sewer Authority with a picket line if Firelands Sewer and Water Construction Co., Inc., was awarded a contract at the Squaw Island site.

According to the credited testimony, at a meeting called by the Sewer Authority to discuss the awarding of a contract to Firelands, Respondent's business representative, McPartlan, said that if the contract was awarded to Firelands his Union would engage in an informational picket. The Administrative Law Judge found that this threat "was by its terms unrestricted in scope and contemplated picketing the entire jobsite including future phases and any employers working there" and therefore constituted a violation of Section 8 (b) (4) (ii) (B).



*Board's Decision and Order.*

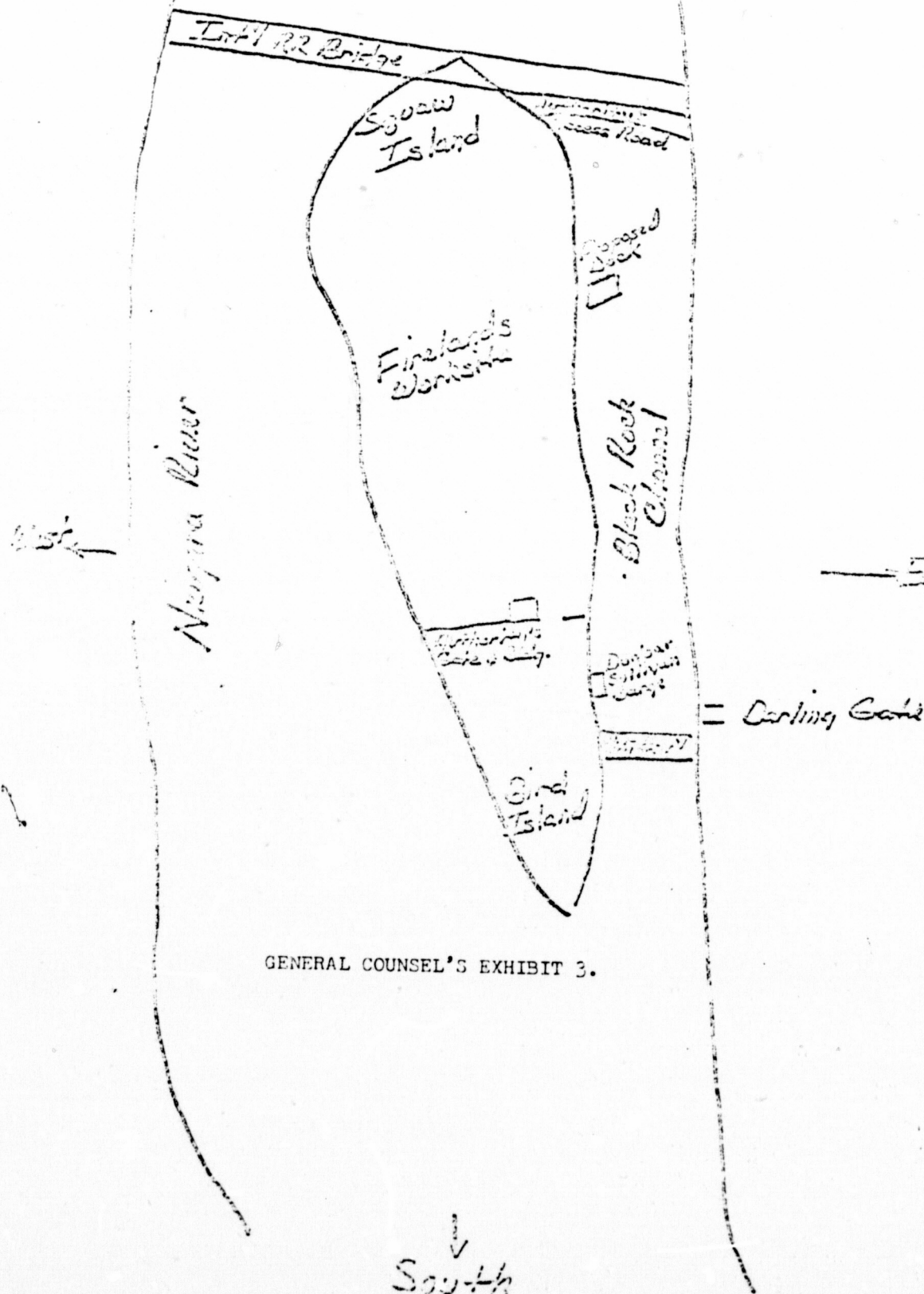
My colleagues disagree with the Administrative Law Judge's interpretation of McPartlan's threat. They say his threat did not contemplate anything more than lawful informational picketing limited to Firelands. It seems to me that this interpretation is disingenuous; it can only be reached with the aid of blinkers. I would remind my colleagues that as observed by Justice Holmes, "Words are not crystals, transparent and unchanged." Meaning of words can rarely be deduced simply by contemplating the words in a vacuum. It is the context in which the words are uttered, the before and after which must be examined to ascertain meaning. It is a fact that when the time came for Respondent to carry out its threat to "engage in an informational picket," it unlawfully picketed the entire Squaw Island jobsite and not simply Firelands' operation at the site. It would be naive not to believe that this was Respondent's intent when it threatened to engage in informational picketing. The Administrative Law Judge so construed the threat; and so do I. Accordingly, I would adopt the Administrative Law Judge's decision in its entirety.

Dated, Washington, D.C.

RALPH E. KENNEDY, *Member,*  
*National Labor Relations Board.*

North

G.C. 3



GENERAL COUNSEL'S EXHIBIT 3.





**[1] Excerpts Stenographic Transcript of Testimony  
at Hearing November 19, 1973.**

**BEFORE THE NATIONAL LABOR  
RELATIONS BOARD  
Third Region**

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In the Matter of:

**INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL NO. 17, 17A, and 17B, AFL-CIO**

and

**FIRELANDS SEWER & WATER  
CONSTRUCTION CO., INC.**

---

Case No. 3-CC-809

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Hearing Room, Ninth Floor,  
Federal Building,  
111 W. Huron Street,  
Buffalo, New York,  
Monday, November 19, 1973.

The above entitled matter came on for hearing, pursuant to  
Notice, at 10:00 o'clock, A.M.

Before:

Hon. Thomas D. Johnston, Administrative Law Judge.

Appearances:

Francis J. Novak, Jr., Esq., 111 W. Huron Street, Buffalo,  
New York 14202. Appearing on behalf of the Counsel for the  
General Counsel.

*G. J. Laehy, for General Counsel, Direct.*

Daniel T. Roach, Esq., 1620 Liberty Bank Building, Buffalo, New York 14202. Appearing on behalf of the Charging Party.

Richard Lipsitz, Esq., One Niagara Square, Buffalo, New York 14202. Appearing on behalf of the Respondent.

[3]

# PROCEEDINGS.

\* \* \*

[6] GILLMAN J. LAEHY was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

Judge Johnston: Have a seat.

## DIRECT EXAMINATION

Q. (By Mr. Novak) Mr. Laehy, with whom are you employed? A. I'm employed by the Buffalo Sewer Authority.

Q. And what's the operation of the Buffalo Sewer Authority?

What's that Authority responsible for, sir? A. Buffalo Sewer Authority is responsible for the collection and treatment of all the sewage within the City of Buffalo and we are under contract to treat certain waste waters from some 13 outlying communities.

Q. Did there come a time in December of 1972 that the Buffalo Sewer Authority let out a certain construction project, sir, or open bids on a certain construction project? A. In December of 1972, the exact date escapes me. I think it was around the 13th we opened bids for the site preparation of the contract for the project for the purpose of erecting a secondary treatment plant on Squaw Island.

[7] Q. And what did that construction project entail? Which steps would that entail, sir? A. This would be removing ... the removal of approximately two million yards

*G. J. Laehy, for General Counsel, Direct.*

of solid waste from the site to the disposal site on Tifft Street Farms, known as Tifft Street Farms, in the southerly part of Buffalo.

Q. Where were you going to remove this waste product from, sir? A. From where?

Q. Yes. A. From the project site on Squaw Island to an area, as I say, known as Tifft Street Farms which is approximately six or seven miles south of the project site.

Q. Was the bid let out to a certain construction firm as a low bidder, sir? A. Ultimately it was, but this contract or this bid opening that occurred in December was rejected. All bids were rejected and it was rebid in June. I believe it was June 11th. And the contract was bid and it was ultimately awarded to the low responsible bidder known as Firelands Sewer & Water Construction.

\* \* \*

A. As I've testified then and as I'll testify now, it's to the best of my recollection that he used the word "strike". But then again, on this point I'll stand corrected but there were no notes of the meeting.

Q. Your best recollection is that he used the word "strike", you're not positive that he didn't say "picketing"? A. My best recollection.

Q. But you're not positive that he didn't say "picket"? A. No.

\* \* \*

*P. Gillum, for General Counsel, Direct.*

[16] Whereupon,

PAUL GILLUM [17] was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

Judge Johnston: Have a seat.

Mr. Novak: May we go off the record?

Judge Johnston: Off the record.

(Discussion off the record.)

Judge Johnston: On the record.

Mr. Novak: In an off-the-record discussion, Mr. Lipsitz and I stipulated to the admittance of paragraph 3 ... would 4 be all right, then?

Mr. Lipsitz: Yes.

Mr. Novak: 4 and 5 of the complaint.

Mr. Lipsitz: That's correct.

Judge Johnston: In other words the stipulation is to admit Paragraphs 3, for Respondent to admit Paragraphs, 3, 4 and 5 of the Complaint with the sub parts, is that correct?

Mr. Lipsitz: Yes, sir.

Judge Johnston: Do you join in that stipulation?

Mr. Lipsitz: Yes, sir.

Judge Johnston: Mr. Roach?

Mr. Roach: I join in it.

Judge Johnston: General Counsel, do you?

Mr. Novak: Yes, sir.

[18] Judge Johnston: Very well. The stipulation is received into evidence.

#### DIRECT EXAMINATION

Q (By Mr. Novak) Mr. Gillum, with whom are you employed? A. Firelands Sewer & Water Construction Company.

*P. Gillum, for General Counsel, Direct.*

Q. And what's your position with Firelands, sir? A. Project Superintendent.

Q. Did there come a time in this year that Firelands started a certain construction project to—pursuant to a contract let by the Buffalo Sewer Authority? A. Yes.

Q. And when did you start on that construction project, sir? A. I think our first work commenced just before the 1st of September or just after Labor Day. I'm not sure. That was our first physical activity on the job.

Q. 1st of September? A. Yes, sir.

Q. How many construction sites are utilized in this project, sir? A. There are two basic sites. The site where the garbage or solid waste is to be removed from and to the site where it's finally to be disposed of.

[19] Q. And where's the debris going to be removed from? A. Squaw Island.

Q. And where's it going to be taken to? A. Tifft Farms which is about six miles south of Squaw Island.

Q. And how do you propose to remove the garbage from Squaw Island to the site? A. It would be loaded on Squaw Island by a series of conveyors into barges. The barges will transport the material to a dock some six miles south and be unloaded with clam buckets and hauling trucks to be disposed of in a sanitary land fill.

\* \* \*

Mr. Novak: I offer a stipulation that GC Exhibit 3 for identification go into evidence as a rough sketch of the Squaw Island work site, so the parties will be familiar with the area we are attempting to talk about here.

\* \* \*



*P. Gillum, for General Counsel, Direct.*

[20] Q. (By Mr. Novak) Mr. Gillum, when Firelands started working on Squaw Island sometime in September of 1973, how many employees did you have employed at the Island, sir, approximately? A. We started out with one or two men. Our work at [21] Squaw Island did not start at the time the work at Tifft Farm started. Tifft Farms started at some later point. We started working at Squaw Island with two men maybe going up unloading the dock and we started adding to it at that point.

Q. Are your employees represented by a labor organization, sir? A. No.

Q. Does Firelands have a contract with any labor organization? A. No.

Q. And will you refer to GC Exhibit 3. Approximately what portion of the island were your employees employed on or about October 8th, 1973? A. At that time all of our work was in the area you have marked as a proposed dock.

C. On October 8th? A. Yes.

C. And would you be on the dock itself or on the island itself? A. Well, we would be, at that point, at that point we would have been on the island itself.

Q. And what type of work would you be performing on the island there? A. Well, on October 8th, we had received a certain [22] amount of equipment onto the island. We were in the process of erecting the equipment, assembling conveyors as they came in, this type operation.

Q. And how did the equipment get to the island? What access road or . . . A. Well, both the access roads are actually restricted by the load limits on the heavy equipment that came into the island by this international railroad or the Canadian National Railroad which has a spur back into the island. It came in by rail.

Q. Has any picketing taken place on the island itself? A. On the island, yes.

*P. Gillum, for General Counsel, Direct.*

Q. On the ... when did that picketing start? A. To the best of my remembrance, October 8th it did start, a Monday.

Q. And where did the picketing take place on the island, sir? A. Well, you have marked where the south end of the island ... "Authority's Gate and Building". There is, in fact, a gate with a roadway passing through it there and on that date, the first date the pickets arrived, they were at that gate and at the gate at the north end where it says "Authority's Access Roads" and it would be on the east side of the Black Rock [23] Channel at that location.

Q. Did the pickets have signs, sir? A. Yes, they did.

Q. And can you recall, to the best of your recollection, what the signs stated? A. Oh, the signs in essence, said that the Fireland Sewer & Water Construction Co., were employing people not enjoying the same benefits as those people represented by 17, 17A and 17B of the Operating Engineers.

Q. Do your employees gain access to the island by land vehicles, sir? A. Yes, they do.

Q. And you either go on the northerly access route where it indicates "Authority's Access Road" or through the Authority's Gate, is that correct? A. Yes, sir. There are only two accesses to the island by land. One is the W. Ferry Street Bridge and the other is Authority's Access Road which is on the north end and then there's another road paralleling the easterly edge of the island. So there's access to the total length of the island through these two gates.

Q. So you now testify the picketing took place on the Authority's Access Road and also at the [24] Authority's Gate and Building, is that correct, sir? A. Yes.

Q. So your employees would pass the pickets ... they couldn't get to the island without passing the pickets, is that correct? A. Correct.

Q. Does Firelands have any sub contractors on this job, sir? A. Yes, we do.

*P. Gillum, for General Counsel, Direct.*

Q. And what sub contractor is that, sir? A. Well, we presently have under a sub contract Dunbar & Sullivan who's a marine and barging type contractor.

Q. Could you tell us when they arrived at the job site, sir? A. Their first piece of equipment came . . . well, it approximately came to Squaw Island on October 9th, late in the evening. The pickets had gone home when it arrived at the south end of Squaw Island.

Q. What type of equipment was that? A. This was a barge with a steam rig on it, various equipment for driving pilings.

Q. And that arrived late in the evening on October 9th? A. Yes, sir.

[25] Q. And also the barge . . . and did the barge moor itself to the island? A. Yes. You have it marked as "Dunbar & Sullivan Barge." This is where they tied up on the evening of the 9th.

Q. Did the pickets have occasion ever to change their side of picketing, from the Authority's gate or from the Authority's Access Road? A. Yes. The next morning, which had . . . would have been October 10th, I went to the island and the pickets had moved from the Authority's Gate and Building southward and were more congregated around the Dunbar and Sullivan Barge that had been docked there during the evening before.

Q. How close to the Dunbar & Sullivan Barge? A. They were right adjacent to the barge.

Q. Within how many feet of the barge? A. Well, it . . . if the barge were three feet from the wall, they were three foot from it.

Q. Do you have any employees working in the vicinity of the Dunbar & Sullivan Barge? A. None.

Q. How far are your employees employed in distance from the Dunbar & Sullivan Barge? A. Well, our work to date has all taken place down [26] to the area of the proposed



*P. Gillum, for General Counsel, Direct.*

dock and that's . . . I'm guessing 2500 feet north of the barge or maybe even 3000 feet from the barge.

Q. How long did the Dunbar & Sullivan barge remain moored to Squaw Island, sir? A. I believe they removed the barge from this place of mooring on the 19th of October. That would be on a Friday.

Q. Did the picketing adjacent to the barge continue from October 10th through the 19th? Were you there at that time? A. Oh, yes. During that period of time they were in the vicinity of the barge.

Q. Has any other type picketing taken place on the island, sir, or near the Dunbar and Sullivan barge? A. Yes, on October . . . I'm not sure but I believe it was October 10th, they had a picket both in the water and around the barge and up north of the barge and back and forth where I could see it where the West Ferry Street Bridge when I crossed the bridge.

Q. Was there a picket sign in the boat itself? A. There appeared to be a picket sign.

Q. Could you read it? A. I could not read it, sir.

Q. Were your employees doing any type work at that [27] time in the Black Rock Channel? A. At that time?

Q. Yes, sir. A. No.

Q. Near the West Ferry Street Bridge. Did you witness how the picket boat navigated, what direction it navigated or what method was used? A. As I said earlier, it didn't seem to have a direction. It seemed to be circling in this area, and quite frankly, I didn't pay attention to what direction it was going.

Q. Did you have occasion to witness any pickets on the barge itself, sir? A. I did see pickets or people bearing picket signs on the barge.

Q. Standing on the barge itself? A. Yes.

Q. Were any of your employees performing work there? A. No.

*P. Gillum, for General Counsel, Cross.*

Q. Or on the barge itself? A. No.

Q. Did you have occasion to see the picket boat moored to the barge itself, sir? A. Yes, sir. On one occasion as I was crossing the [28] West Ferry Street Bridge, I did observe it being tied to the barge.

Q. Where are your employees presently performing work on the island? A. Still in the same area, at the dock site.

Q. Is that where I have marked on the exhibit "Proposed Dock", is that a dock now? Has it been constructed? A. That is, in fact, a dock now. It has been constructed as a dock.

Q. Are your employees performing work on the dock itself? A. Well, the dock is in place. We are in the process of mounting conveyors on the dock preparatory to loading barges.

Q. Approximately how far is the dock from the West Ferry Street Bridge, sir? A. I guess would be 3,000 feet.

Q. And how wide is the channel, the Black Rock Channel, approximately? A. Again, a guess, 300 feet. I'm not a sea-going type individual.

\* \* \*

[29] CROSS EXAMINATION:

Q. (By Mr. Roach) Can you give us some estimate as to distance between the Dunbar & Sullivan Barge and the Authority Gate? A. I would guess that between 300 and 500 feet. At least 300 feet I would say. Maybe up to 500.

\* \* \*

CROSS EXAMINATION

Q. (By Mr. Lipsitz)

\* \* \*

[30] Q. I think you testified that the picketing on that day was on the east side of Black Rock Channel near the

*P. Gillum, for General Counsel, Cross.*

Authority Gate. That's in error, too, if you said it? A. No, the picketing on the north end did occur. . . I cannot recall any pickets on the west end of the Authority Access Road at the north end of the island.

Q. My notes indicate that you testified they picketed on the east side of the Black Rock Channel. If you said that, you meant they picketed on the island on its east side which is the west side of the Black Rock Channel, isn't that correct? [31] A. Which end are we talking about?

Q. Either end. A. On the north end the pickets have always been stationed on the . . . not on the island itself. .

Q. On the mainland? A. Mainland.

Q. So that's the east side of the Black Rock Channel? A. Yes.

Q. On the south end, the pickets were located on the island itself? A. Yes.

Q. Which is the west side of the Black Rock Channel and the east side of Squaw Island?

\* \* \*

Q. My question is, the witness, Mr. Gillum, observed the pickets on November . . . on October 9th as well as October 8th? A. Well, I'm sure I had business on the island on [32] October 9th, and that on every occasion I went to the island, there were pickets there.

Q. So whether you were actually there or not on the 9th, you're not certain, but if you were, you saw pickets there? A. Right.

Q. And I take it that the picketing until, according to your testimony, the Dunbar & Sullivan Barge was moored, did not change its location or character? A. No.

\* \* \*

*P. Gillum, for General Counsel, Cross.*

[34] Q. (By Mr. Lipsitz) Taking up that question, Mr. Gillum, and we'll do it in another fashion, what's your best estimate of the distance between the [35] Authority's Gate on this ... reflected on this map and the northern most place of the Dunbar & Sullivan equipment? A. The northern most place?

Q. Yes, the place closest to it. A. Well, that would probably be the ... the 250 feet, I suppose.

\* \* \*

[36] Q. Okay. Now then on the morning of the 10th your testimony is that you observed pickets that had moved from the Authority's Gate towards the Dunbar & Sullivan Equipment, is that correct? A. Yes, sir.

Q. Leaving no pickets at the Authority's Gate? A. I think there was still a picket or two at the Authority's Gate.

Q. So what your recollection really is that the total number of pickets extended the area they're picketing to be closer to the area of the Dunbar & Sullivan equipment, isn't that an accurate way of stating it? A. I missed the statement you made.

Mr. Lipsitz: Would you read it back.

(The pending question was read back by the Reporter.)

The Witness: No, that's not totally accurate. [37] There were one or two people left at the gate and the remaining group of pickets were congregated back near the barge.

Q. (By Mr. Lipsitz) How many were there? A. I don't know. I would guess six, ten. I don't know.

Q. It's a guess though as to whether there was six or ten? A. Yes. There was a group at the barge and one or two at the gate.

\* \* \*

*P. Gillum, for General Counsel, Re-direct.*

[40] Q. All right. Now then, you already anticipated my next question. You saw each day thereafter you were there you saw the pickets' boat, is that right? A. Well, if we're going all the way to today, I can't say.

Q. During the time the barge was there. A. Yes, on every occasion I went by, I think I saw the picket ...

Q. That's your best recollection? A. Right.

Q. And you didn't have it under observation for more than the same momentary period of time? A. I never sat and watched it, right.

Q. And you only saw it around the area of the Dunbar & Sullivan Barge? A. Are you talking about the period of time the barge was there?

[41] Q. Yes. A. I only saw it in that general vicinity.

Q. Ever saw it away from the barge? A. No.

\* \* \*

[43] Q. Mr. Gillum, when the Firelands employees come into work, I think you testified that they either have to go over the West Ferry Street Bridge at the south or the Access Road over the International Railroad Bridge at the north, is that correct? A. Yes.

Q. They don't use marine equipment to come into work? A. No.

\* \* \*

[46] RE-DIRECT EXAMINATION:

Q. (By Mr. Novak) Mr. Gillum, when you observed the pickets adjacent to the Dunbar & Sullivan Barge, did you observe them adjacent to the southerly most portion of the barge? Did you observe that, sir? A. No. It's my recollection that they congregated more around where the equipment was located on the barge which would be about mid point of the one barge.

*P. Gillum, for General Counsel, Re-cross.*

Q. Okay. Did you observe the picket boat at the southerly portion of the Dunbar & Sullivan Barge? A. The picket boat was at the southerly end of the barge when I observed it being moored there.

Q. Does Firelands use the waterways at all in the performance of their job on Squaw Island? [47] A. No.

Q. Would it be correct to say that if there was picketing at the northerly Access Road and the Authority's Gate and Building, that the union would be able to reach any and all employees reaching your work site? A. Yes.

\* \* \*

#### EXAMINATION:

Q. (By Judge Johnston) Am I correct, you testified there was a road running along the Black Rock Channel? A. On the island side itself, yes.

Q. And how close would that pass to where the barge, Dunbar & Sullivan Barge was located? A. We have a road and a wall and it was right adjacent to the wall. In other words it's actually a [48] wall at that point.

Q. What kind of wall would that be? A. A concrete wall so your barge is very close to the roadway.

Q. Now, the designation "Authority's Gate and Building", is there actually a gate across the roadway there? A. Yes, there is.

Q. Is this gate closed at anytime? A. Yes, it is.

Q. Who controls the gate? A. Buffalo Sewer Authority.

\* \* \*

#### RE-CROSS EXAMINATION:

Q. (By Mr. Lipsitz) Is this wall a retaining wall? A. Well, it's a retaining wall. There's a wall and then there's a platform that was moored against—it doesn't show on here, but the

*A. Headley, for General Counsel, Direct.*

barge—there's only a wall that separates the road from the water.

Q. You mean a wall which is the height of a vehicle or a wall which runs from the ground level down into the water?

[49] A. Well, it runs from the ground level down and sticks up three or four foot.

Q. Any vehicle passing by is clearly observable over the wall from the barge, I take it? A. Yes, right.

Q. In other words it's not a wall such as the height of this wall (indicating) which would interfere with observation? A. Right.

\* \* \*

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[50] Whereupon,

ALBERT HEADLEY was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

Judge Johnston: Would you mind removing your gum.

DIRECT EXAMINATION:

Q. (By Mr. Novak) Mr. Headley, would you spell your last name? A. H-e-a-d-l-e-y.

Q. Mr. Headley, with whom are you employed? A. Dunbar & Sullivan Dredging Company.

Q. And where's that outfit out of? A. Dearborne, Michigan.

Q. And what type of work does Dunbar & Sullivan perform, sir? A. Marine excavating, marine construction, dredging.

Q. Is Dunbar & Sullivan one of the contractors for Firelands Sewer & Water Construction Co., Inc.? A. Yes.

*A. Headley, for General Counsel, Direct.*

Q. And what type of contract is that, sir? A. We have a contract for constructing a dock for them at Squaw Island and we have a contract to haul this barge materials from Squaw Island to the Tifft Street farm area.

[51] Q. Okay. When was the first day that Dunbar & Sullivan arrived on the job, sir? A. October 9th, late in the afternoon or early evening.

Q. And how did you arrive? What method did you arrive on the job site? A. We had some tugs to take our equipment from Cleveland down to the end of the Black Rock Canal and placed along the wall just north of the Ferry Street Bridge.

Q. And you moored two barges on the bank of the Squaw Island, sir? A. Correct.

Q. Okay. When you arrived on the 9th, sir, did you witness any picketing on the job site? A. Yes. I observed pickets at the northerly access road and the mainland side and also pickets at the Sewer Authority's Gate near the south end of the island.

Q. In regards to picketing on the southerly end of the island at the Authority's Gate, were the pickets congregated right at the gate? A. Correct.

Q. Were they strung out or were they right at the gate? [52] A. My first observation, there was about four pickets within 50 feet of the gate.

Q. Did the picketing at anytime change in character, sir, or position? A. On this particular date?

Q. On this date or any date thereafter. A. The following day, October 10th, they moved down the southerly—along the roadway adjacent to where our barge was tied to the dock.

Q. Did you witness the pickets move from the Authority's Gate to the barge? A. In the early morning, some of them moved from the gate and I saw them walk southerly along the roadway to the vicinity of our barge.



*A. Headley, for General Counsel, Direct.*

Q. How far of a walk would that have been to where they were to— A. About 200 feet.

Q. And then they picketed adjacent to your barge, sir? A. The pickets were strung along the wall adjacent to our barge.

Q. Approximately how far from your barge? A. Five feet.

Q. And do you recall what the picket signs stated, sir? [53] A. Something to the effect that Firelands were not paying equivalent fringe benefits enjoyed by members of Local 17.

Q. Are your employees represented by a labor organization? A. Yes.

Q. And what labor organization is that? A. Local 18 which is the Marine Branch of the Operating Engineers.

Q. On October 10th, how many employees did you have on the job site on that day, sir? A. Two.

Q. And their work would be performed on a barge itself, sir? A. That's correct.

Q. And what was going to be your method of operations on that particular day on the 10th? A. On the 10th we planned to move the barge across the Black Rock Canal and pick up some piling and load them aboard the barge and then proceed to the purposed dock site, begin driving piling.

Q. You were going to move your barge directly east to the mainland side? A. Correct.

Q. And what were you going to do once you reached [54] the mainland there? A. We were going to load piling aboard the barge that we had with us.

Q. Who furnished the piling, sir? A. Herbert F. Darling Construction Company.

Q. Is Darling one of your sub contractors? A. Correct.

Q. And what type of work were they going to perform for you? A. They were to provide the pile drivers, that is, the personnel to drive the piling and they were going to supply the piling themselves.

*A. Headley, for General Counsel, Direct.*

Q. On October 10th, did you witness any other form of picketing outside of the picketing at the barge itself? A. Yes, there were picket boats in the water that morning, two of them.

Q. And would the same type signs on—be on it? A. Correct.

Q. There were two picket boats? A. Yes.

Q. And did you witness how the picket boats navigated. A. They were moving easterly and westerly back and forth across the canal. I observed them moving north [55] and southerly between the proposed dock site and bridge.

Q. Did you observe them moving east and west where your barge was docked and where you were to pick up some piling from Darling? A. Correct.

Q. Were Darling employees first going to go to your barge and then you were going to go pick up the piling on the mainland side or were you going to go there first to pick up the Darling employees— A. They were going to pick up the Darling employees and bring them back on the barge and transport the men and barge and everything easterly across the canal to pick up the piling.

Q. And then, ultimately, up to the proposed dock area? A. Correct.

Q. On this particular day, were any Firelands employees performing work in the vicinity of your barge or in the channel? A. No.

Q. Approximately how far were Firelands employees performing work from the barge? A. Approximately 2500 feet northerly.

Q. Did your employees come, in fact—go in a boat [56] to the mainland side and pick up Darling employees? A. We went over there with a boat but the Darling employees would not get into the boat.

*A. Headley, for General Counsel, Direct.*

Q. How do you know this, sir? A. I overheard them telling their supervisory—their supervisors that they won't—

\* \* \*

[57] Q. (By Mr. Novak) What did you overhear Darling employees tell their Employer? A. I overheard them telling their supervisor that they wouldn't get into the picket boat and—or, pardon me, into the boat of conveyance that we furnished and cross the canal because of the pickets in the water.

Q. Where is the picket boat when—did you have a row boat? A. Yes, we had a row boat to transport them across.

Q. Where was that picket boat in relation to that row boat when you were going across the channel? A. It was beyond the—it was meandering around the general area.

Q. What general area? A. Between the barge and the east bank of the canal where we were going to pick up the Darling employees.

Q. Did you witness any picketing on your barge itself?

\* \* \*

[58] The Witness: I saw pickets aboard our barge, yes.

Q. (By Mr. Novak) Where were you when you saw these pickets? A. I was on board the barge myself.

Q. Did you have occasion to witness any picketing? Did the picket boat moor itself to your barge? A. Yes. I saw the picket boat tied to our barge on several occasions.

Q. Where were you when you saw it? A. I was on board the barge.

Q. How long did the picketing take place adjacent to your barge? A. They were there every day that I was there which was most every day between October 10th and October 19th at which time we removed the barge.

*A. Headley, for General Counsel, Direct.*

Q. For what reason did you remove your barge, sir? A. It was quite evident that we couldn't get personnel to come aboard our barge to proceed with our work.

Q. I call your attention to November 14th, 1973. Did Dunbar & Sullivan have occasion to go to Squaw Island to perform some work on that date, sir? [59] A. Yes. Mid-morning of the 14th we sent our tug down to the Squaw Island loading dock to move some equipment at the dock.

Q. And how did you proceed to Squaw Island? From the south up through the Black Rock Channel through the Ferry Street Bridge? A. Yes. We proceeded southerly up the Black Rock Channel through the Ferry Street Bridge.

Q. You proceeded northerly, you mean? A. Pardon me, northerly through the Ferry Street Bridge and we encountered a picket boat approximately 200 feet north of the Ferry Street Bridge. Our Tug Captain said that he could not cross that picket line.

Mr. Lipsitz: Same objection, your Honor.

Judge Johnston: You lay a foundation.

Q. (By Mr. Novak) Who's your Tug Captain? A. Lloyd Mills.

Q. Were you on the tug boat yourself? A. I was aboard the tug.

Q. And you witnessed picketing as you were approaching Squaw Island? A. We observed, when we were approximately 800 feet south of the Ferry Street Bridge, we observed the boat in the water which appeared to be about 200 feet [60] north of the bridge.

Q. Where did you first notice the boat? Was it moored and then left— A. It was coming out from the—proceeding from the westerly bank of the Black Rock Canal to the center of the canal.

Q. Well, where your barge was before? A. Correct.

*A. Headley, for General Counsel, Direct.*

Q. It was proceeding from a mooring where your barge was prior to October 19th, correct? A. Correct.

\* \* \*

[61] Q. (By Mr. Novak) Did you proceed through the Ferry Street Bridge, sir? A. We proceeded through the Ferry Street Bridge approximately 200 feet at which time the boat then turned around.

Q. Your tug boat turned around? A. That's correct. Our tug boat turned around and proceeded southerly and left the site.

Q. And where was the picket boat in relation to your tug as you were in the process of turning around, sir? A. It was approximately 75 to 100 feet out in front of us and he moved northeasterly, I assume to give us room to turn around.

Q. Did you have occasion to engage in a conversation with anybody on the picket boat while you were in the process of turning the tug around? A. Yes.

Q. And what, if any, conversation did you have? A. I asked the men on the picket boat if there was a picket line. One of the gentlemen in the boat nodded affirmatively.

Q. Which one, sir? A. The one that was sitting in the bow of the boat. [62] I then asked them who they were picketing. He hollered back "Firelands". I then explained to him that we were a bonafide union company, union personnel, and asked him if he was picketing us. He answered, "Yes, sir." This was all taking place while we were in the process of turning around.

Q. Where were you on the tug boat? A. I was on the bow of the tug.

Q. Approximately how far away from the— A. About 75 feet away from the picket boat.

Q. And could you tell us again what the response was to your question whether they were picketing you?

\* \* \*

*A. Headley, for General Counsel, Direct.*

Q. (By Mr. Novak) Mr. Headley, I call your attention to November 16th, 1973. Did Dunbar & Sullivan have an opportunity to perform any work on Squaw Island on that date, sir? A. Yes, we proceeded northerly in the Black Rock [63] Canal with our tug boat.

Q. Was the picket boat where it was before, sir? A. No.

Q. Okay. You proceeded up through the Black Rock Channel? A. We proceeded up through the Black Rock Channel, headed for the dock site. The picket boat at that time was located approximately 50 to 100 feet north of the proposed dock site. As we approached the dock, the picket boat turned and proceeded southerly, placed itself about half-way between the dock and our tug boat at which time our tug boat turned around and proceeded southerly out of the Black Rock Canal.

Q. I call your attention to November 17th, 1973. Did Dunbar & Sullivan on that date have occasion to perform any work on Squaw Island? A. Yes. On this date again, we proceeded northerly in the Black Rock Canal bound for the dock site on Squaw Island. Upon approaching the Ferry Street Bridge we observed the picket boat coming out from the westerly side of the canal, proceeded towards the center of the channel at about the same time we were coming through the Ferry Street Bridge at which time our tug captain turned around and proceeded southerly out of the Black Rock Canal.

[64] Q. Did you have any employees on your boat from Firelands? A. No.

Q. Any employees working in the vicinity of the tug boat around the Ferry Street Bridge or where their boat was moored? A. No.

\* \* \*

*A. Headley, for General Counsel, Cross.*

**CROSS EXAMINATION:**

Q. (By Mr. Lipsitz) Mr. Headley, what's the length overall of the equipment that you had moored between the 10th and the 19th? A. 260 feet.

Q. And how far away is the northern most part or was [65] the northern most part of that equipment from the Authority's Gate if you can estimate? A. 200 feet.

Q. Did you measure it or is that an estimate? A. It's just an estimate.

Q. The Firelands people, while you were there, passed the vicinity of your mooring to go to work on that road, isn't that correct? A. Correct.

Q. How did your employees come to work between the 10th and the 19th or do they live on the barge? A. They come aboard the barge right where it was moored along the dock.

Q. By what means? A. They come across the Ferry Street Bridge and drove their automobiles or vehicles, whichever they had.

Q. Past the pickets and went into work? A. Right.

\* \* \*

[67] Q. All right. And on the 14th when you say you saw the—withdraw that. You're on the barge or the tug? A. Tug, aboard the tug.

Q. And that proceeded in a northerly direction in [68] the Black Rock Channel when it approached the Ferry Street Bridge and then 200 feet north of it you saw a boat from the westerly bank proceeding into the channel, is that correct? A. Correct.

Q. Now, what boat did you see? Would you describe that? A. It appeared to be approximately 14 foot aluminum boat with an outboard motor on it.

Q. Had you seen that boat there before? A. Yes.

*A. Headley, for General Counsel, Cross.*

Q. When? A. On various occasions since the 10th of October.

Q. And you identify that as a boat you had seen between the 10th and 19th? A. Yes.

Q. But you don't recall whether you had ever seen any other people on it before? A. I couldn't identify them from one day to another. I wasn't always that close to them.

Q. Nobody's being critical. Sitting here now, you don't know if you ever saw those people before? A. No.

Q. Were there any signs in the boat? A. Yes, there were standard picket signs that they [69] had been using.

Q. On the 14th, the same signs as you saw before? A. Yes.

Q. Was the motor running when you had—withdraw that. After you saw them, you had some conversation with your captain who then turned around and left or did you have a conversation first with the man on the picket boat? A. The captain proceeded to turn the tug around.

Q. And while he was turning, you had this conversation? A. Correct.

Q. How far away were you when you had this conversation? A. Approximately 75 feet.

Q. And was the motor running in the outboard which bore the pickets? A. During the time of this attempted conversation, yes.

Q. How about the motor in the tug? A. Yes, it was running.

Q. Were you shouting at one another? I'm not inferring anger, but were you shouting at one another to be heard? A. I was talking rather loud, yes.

Q. Now, you first said to him, talking rather loud, "Is this a picket line or is this a—" well, withdraw [70] that. What was the first thing that you said to him talking rather loud? A. I believe I asked him if this was a picket line.



*A. Headley, for General Counsel, Re-direct.*

Q. What did they say? A. He nodded affirmatively.

Q. What did you say then? A. I asked them who they were picketing. They answered "Firelands."

Q. What did you say? A. The next thing I explained to them we were a bonafide union contracted company, that we were trying to go to work here on this job. I believe—

Q. That invoked no response, is that correct? A. Correct.

Q. Then what did you say? A. I asked them if they were picketing us?

Q. Did you use the word "us"? A. I was standing on the boat asking him—I'm quite sure I used the word "us" or "this company".

Q. You're not certain though? A. No, I'm not certain whether it was—I was referring to—

Q. I know what you were referring to but I want to know the words you used. You're not certain whether you asked whether they were picketing "us" or "this [71] company"? A. Correct.

Q. You could have used the words "this company"? A. Correct.

Q. And the answer was, "yes, sir"? A. Yes.

Q. That was all the conversation you recall? A. Correct.

\* \* \*

[75] RE-DIRECT EXAMINATION:

Q. (By Mr. Novak) Mr. Headley, on the 14th of November you actually did see the picket boat leave its mooring on Bird Island there, is that correct? A. No.

Q. You did not.

Mr. Lipsitz: You mean Squaw Island?

Judge Johnston: You said "Bird Island."

Mr. Novak: There were two islands at one time. Now, because of various land filling, they're one.

*A. Headley, for General Counsel, Re-direct.*

Mr. Lipsitz: It's one body of land and the lower end is Bird Island and the upper end is Squaw Island.

Q. (By Mr. Novak) When you were approaching the Ferry Street Bridge on the 14th, where did you notice the picket boat coming from at that time? A. It was coming out again from the westerly portion of the Black Rock Canal, but because of the bridge [76] location, we cannot see the dock site north of the bridge.

Q. Now, on the 16th, when you were on the dock itself and your tug was approaching the dock from the south, did the picket boat turn its position in the channel and position itself in between your tug and the dock itself? A. Correct.

Q. It made a turn then instead of going straight right back down the channel, is that correct? A. Correct.

\* \* \*

[77] Q. (By Mr. Novak) I show you General Counsel's Exhibit 4 for identification. The pickets you engaged in a conversation with on the 14th, are those the gentlemen that are pictured in this Buffalo Courier Express news photo, sir? A. That's it.

\* \* \*

Q. (By Mr. Novak) Now, Mr. Headley, your tug boat, is it in anyway identified as being property of Dunbar and Sullivan? A. Yes, it has "Dunbar & Sullivan Dredging Company", [78] I believe, printed across the bow of the pilot house.

Q. What about your barge, is there any identifying marks on the barge itself that it's Dunbar & Sullivan? A. On the derrick it has "Dunbar & Sullivan".

\* \* \*

*R. J. Shafer, for General Counsel, Direct.*

[79] Whereupon,

ROY J. SHAFER [80] was called as a witness by and on behalf of General Counsel and, after having been first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Novak) Mr. Shafer, by whom are you employed? A. Herbert F. Darling, Inc.

Q. And Darling is a General Contractor in construction?

A. Engineering Contractor.

Q. Did you have occasion to enter into a contract with Dunbar & Sullivan to perform certain work on Squaw Island, sir? A. Yes. We had a contract with Dunbar & Sullivan.

Q. What type of work were you going to perform, sir? A. We had a contract to supply labor and material to perform a certain amount of work on this project.

Q. When was your first date on the job, sir? A. October 10?

Q. Did Darling utilize any type of entrance for their employees to gain access to the job? A. Well, we had success to the side of the job that was through a gate owned jointly between, I think it was, the Sewer Authority and the New York State Thruway Authority.

[81] Q. That would be on the mainland side of the channel approximately directly across from where I have indicated "Dunbar & Sullivan" on Exhibit 3, is that correct? A. Yes, sir.

Q. So your employees gained access to the job by what, going to the mainland side? A. Yes, sir. They drove their cars through the gate to an open area.

Q. Did you have the gate in anyway marked? A. Yes. We had a sign prepared by a commercial printer which said the

*R. J. Shafer, for General Counsel, Direct.*

gate was to be used exclusively by the Herbert F. Darling employees.

Q. Were you on the job site on October 10th? A. Yes.

Q. Did you witness how your employees gained access to the job site? A. Yes.

Q. And how did they gain access? A. They drove automobiles through the gate.

Q. When you arrived on the job site, was there any Operating Engineers Representatives at the job site when you arrived? A. They were on the island side.

Q. Was there any in your vicinity? [82] A. Pardon me?

Q. Was there any Operating Engineers Officers or Representatives in the vicinity of where your employees were? A. After we entered the gate, yes, sir.

Q. And who was that? A. Mr. Chaffee.

Q. And who's Mr. Chaffee? A. I understand he's the Business manager for Local 17.

Q. And how did he arrive on your job site? A. He walked over from the island across the bridge and up through the gate.

Q. Did he go through the gate itself, your gate? A. Yes, sir. The gate was open.

Q. Did Mr. Chaffee have any type of sign with him? A. He had the typical placard type sign with him on but he had it turned over on his chest.

Q. So the reading wasn't visible? A. No, it was the blank side.

Q. Did you observe what Mr. Chaffee did when he entered your gate, sir? A. Yes, approached our crew and they were discussing what I don't know, I wasn't invited to attend.

[83] Q. You didn't overhear the conversation? A. No, sir.

Q. After Mr. Chaffee's conversation, did he leave through your gate again? A. Yes, sir. That's the only way he

*R. J. Shafer, for General Counsel, Direct.*

could get out. Turned around and walked out through the gate.

Q. When you got outside your gate, did you witness him turn around the sign or anything like that? A. Yes, sir, he flipped it over.

Q. And then did you see what the sign was? A. I recognized it to be the same sign as the rest of the fellows were carrying.

Q. Did you witness any picketing when you arrived on the job October 10th where the picketing was? A. Yes, I would say it was westerly of the site marked by the Dunbar & Sullivan barge along the roadway.

Q. Could you see the Dunbar & Sullivan barge from the mainland there? A. Yes.

Q. Was there any picketing adjacent to it, sir? A. Yes. I believe I made that statement it was adjacent to the barge on the westerly side.

Q. Did you have occasion to observe any other form of picketing? [84] A. Yes, sir. Directly after Mr. Chaffee left, two boats appeared in the water between the site of the Dunbar & Sullivan barge and the easterly shore of the mainland.

Q. How close did they come to where your employees were, sir? A. Oh, a safe distance, it's . . . it stayed in the water of course, but they could read the signs.

Q. You could read the signs? A. Yes.

\* \* \*

[85] Q. Did in fact, a Dunbar & Sullivan row boat come over to the mainland side of the island? A. Correct.

Q. To pick up your employees? A. Correct.

Q. Did your employees go onto the row boat, sir? A. No, sir.

*R. J. Shafer, for General Counsel, Direct.*

Q. Did you ask them why they did not go on the row boat?

A. I did not. I was not there at this time. I had left.

Q. You had left the job site itself? A. Yes.

Q. Did you have any occasion . . . had your employees left the job site? A. No, sir. I had a Superintendent I left behind.

Q. Did you have any conversation with your employees at all on the date? A. Yes, sir.

Q. And what conversation was that, sir? A. I asked them if they would go to work.

\* \* \*

[86] Q. (By Mr. Novak) What did your employees tell you? A. They said they couldn't cross the picket line.

Q. Did your employees in fact work on that day? A. No.

Q. Any date subsequent to that? A. No, sir.

Q. Have you been able to perform the contract you have with Dunbar & Sullivan, sir? A. No, sir. The contract was taken away from us.

Q. How many days did you attempt to perform this particular operation you had planned, sir? Did you come back to the job site on the 11th? A. Yes, sir. We were there every day from the 10th to the . . . I believe it was the 19th, a Friday.

\* \* \*

[87] Q. (By Mr. Novak) Was there a picket boat in the water after you testified on October 10th, 1973? A. Yes, sir.

Q. How many times did you witness the picket boat? A. Every day we reported for work.

Q. And where was the boat in the channel, sir? A. Between the Dunbar & Sullivan barge and the mainland and it

*T. M. McPartlan, for Respondent, Direct.*

would operate between the West Ferry Bridge northerly towards the International Railroad Bridge. At least the proposed dock site.

Q. Were any Firelands Employees working the vicinity where your employees were? A. No, sir.

Q. Did your employees, after the 10th through the 13th ever work or perform any type of work? A. No, sir.

Q. Did they report every day? A. Yes, sir.

\* \* \*

Judge Johnston: On the record. I understand there's a stipulation to be proposed with respect to location between the bridges. Do you want to make that stipulation, Mr. Novak?

Mr. Novak: Yes, that approximate distance between the West Ferry Bridge and the International Railroad Bridge on GC Exhibit 3 is approximately three-quarters of a mile.

Mr. Lipsitz: I'm willing to enter into that stipulation.

Mr. Roach: So stipulated.

Judge Johnston: The stipulation is received.

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[114] Whereupon,

THOMAS M. McPARTLAN was called as a witness by and behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Lipsitz) Mr. McPartlan, by whom are you employed?

*T. M. McPartlan, for Respondent, Direct.*

Judge Johnston: First of all, would you get his name and address for the record. Would you state your name and address for the record.

The Witness: Thomas M. McPartlan, 87 Clark Street, Orchard Park, New York.

Q. (By Mr. Lipsitz) By whom are you employed, Mr. McPartlan? A. I'm employed by the International Union of Operating Engineers, Local 17, 17A, 17B and 17C.

Q. In what capacity? A. Business Representative.

Q. How long have you been so employed? A. I was employed from June . . . pardon me . . . July or September of 1965 until June, 1966, at which time I resigned. I became again employed by the union in 1971, September until the present time.

Q. Who's your superior in Local 17? [115] A. Mr. Richard Chaffee.

Q. What's his position? A. Business Manager.

\* \* \*

[120] Q. Did Local 17 take any action as a result of your observations that work had started at the Tifft Street farm? A. Yes, we did.

Q. What did you do? A. We established informational picket line.

Q. Where, what location? A. At the Tifft Street site.

\* \* \*

The Witness: The exact wording is "Employees of Firelands Sewer and Water Construction Company, Inc., are employed to perform Operating Engineers work on this job under wage and other conditions of employment inferior to those enjoyed by employees



*T. M. McPartlan, for Respondent, Direct.*

[121] represented by the Operating Engineers Local 17, 17A, 17B, affiliated with the AFL-CIO."

Q. (By Mr. Lipsitz) Now, when did that picketing begin at the Squaw Island . . . excuse me . . . excuse me, Tiff Street? A. September 25th.

\* \* \*

[126] Q. Did you see another contractor on the job site [127] and, if so, when? A. When we came to the site on the morning of the 10th, Dunbar & Sullivan had moved the derrick boat and the work barge.

Q. What instructions did you give the pickets on the boat as to what they were to do on that boat or those boats?

\* \* \*

The Witness: To conduct their picketing activities in the area between the West Ferry Street Bridge and the International Railroad Bridge.

Q. (By Mr. Lipsitz) And on the 10th, did they as far as you know, was that what the boats did? A. Yes, they did.

Q. Did you at anytime observe the movement of boats when they came back to the south and prepared to go back north again, what they did, what the boats had to do? A. Yes, I did.

Q. What did they have to do in order to go back to the north? A. Well, there's times they'd come back and they'd [128] turn around, you know, at the south end and go north again. There's times when they go back, they might change, you know, people in the boat and then they dock or get fuel or coffee. Just take a break.

Q. Was there one or more than one docking area for those

*T. M. McPartlan, for Respondent, Direct.*

boats in the vicinity of the southern part of the picketing? A. Yes, there's one docking area there.

Q. And where was that? A. Just south of the illustration where it states "Dunbar & Sullivan Barge".

Q. What was the condition of the bank where the Dunbar & Sullivan Barge was located? A. Well, that's a wall of steel sheeting. It's a straight wall with no ladders, no stairs, nothing.

Q. Except for the docking area, is a boat able to dock there and discharge anybody from the boat? A. No.

Q. Now, how did you arrange for fuel and refreshments for the people on the picket boats? A. Well generally, I went and got the fuel for them, brought it back.

Q. Where was the fuel kept? You didn't have any storage tanks there? A. No, we had three five gallon cans.

[129] Q. And where did you keep that fuel? A. Well, we didn't store any. When the boat would get low, we'd go get the fuel, bring it back and put it in the boat.

Q. Well, did you throw it off of a bridge into the boat actually, or did you have the boat come over and get it? That's what I want you to tell us. A. We had to bring the boat over.

Q. To where? A. To the dock. On the location to Dunbar & Sullivan's work barge.

Q. And while there, then did you provide the boat with gas? A. Yes.

Q. How about refreshments? A. Yes.

Q. Same way? A. Yes.

\* \* \*

Q. Don't guess. I want you to tell us your observations? Did that picketing, which you've described, continue beyond the 10th of October? A. Yes, it did.

Q. For how long? A. It's still being conducted.

*T. M. McPartlan, for Respondent, Cross.*

[132] CROSS EXAMINATION:

Q. (By Mr. Novak)

\* \* \*

[134] Q. Okay. You started informational picketing somewhere around September 25th, is that correct? A. Yes.

Q. At the Tifft Street Farm and then later on the 9th on Squaw Island, is that correct? A. October 9th, yes.

Q. And what did your picket sign state again, sir? A. "Employees of Firelands Sewer & Water Construction Company, Inc., are employed to perform operating engineers work on this job under wages and other conditions of employment inferior to those enjoyed by employees represented by the operating engineers Local 17, 17A, 17B, affiliated with the AFL-CIO."

Q. I assume you investigated the money the employees of Firelands are being paid, is that correct, sir? A. No, I haven't.

Q. You don't know what they're being paid? A. No.

Q. It might be more than what your employees are getting, isn't that correct? A. It could be.

Q. You know what kind of fringes they're getting? A. No.

[135] Q. It could be more than your employees, right? A. I suppose it could be.

Q. You never investigated with the Firelands people what they are receiving? A. No.

Q. So your picketing commenced on or about October 9th and it was on the mainland side of the northerly access road and at the Authority's Gate and you said it strung out a little . . . approximately how many feet from the gate itself on the 9th? A. Referring to your exhibit . . .

Q. Yes. A. I'd say about mid-point between where it illustrates "Dunbar & Sullivan Barge" and the "Authority's Gate and Building".

*T. M. McPartlan, for Respondent, Cross.*

Q. At that time did you know where the Firelands Employees were employed performing work on the island itself?

A. Yes, I did.

Q. And approximately where on the island were Firelands Employees performing work? A. About in the area where it's illustrated here where it says "Proposed Dock."

\* \* \*

[136] Q. Okay. By picketing at the Authority's Gate and by picketing the northerly access road, you'd be able to reach all Firelands Employees getting onto the job site, is that correct? A. Yes.

Q. You had no knowledge that they were gaining access to the island by use of a water vehicle, did you? A. There was a possibility.

Q. Did you have any evidence of that, though? Anything's possible. Do you have any evidence that they were gaining access to the island? A. Knew there was a restriction on both those bridges [137] as to the size of the vehicles and the weight of the vehicles that would be brought onto the island by land.

Q. Have you, from October 9th to the present date, seen any Firelands Employees gaining access to that island on other but land vehicles? A. No, I haven't.

Q. So on October 10th, Dunbar & Sullivan barge came up, is that correct, or the night before, after the picketing ceased, I assume. In a Federal Court Proceeding, you testified that you seen your pickets picketing right on the Dunbar & Sullivan Barge, is that correct? Didn't you testify to that? A. That I saw people, our pickets on the barge?

Q. Yes. A. Yes, I did.

Q. With signs? A. I don't recall . . . yes, I think they did have signs.

*T. M. McPartlan, for Respondent, Cross.*

Q. Now, you knew that no Firelands Employees were employed on that barge or in that vicinity, didn't you? A. As I testified, I think previously, crossed to get on our picket boat with fuel.

Q. You knew there were no Firelands Employees working that vicinity of the Dunbar & Sullivan Barge, is that correct? [138] A. Yes.

Q. Why did you picket over there? A. We weren't picketing . . .

Q. Why did you picket on the barge? A. We didn't picket on the barge. We crossed the barge but we weren't actually picketing on the barge.

Q. Well, you picketed by boat on the 10th, isn't that correct, sir, until the present? A. Yes.

Q. Why are you picketing by a boat? A. Because there's a possibility that the . . . and they have brought equipment and materials and everything and people have come to the job by water . . .

Q. Not Firelands Employees, though. Have you seen any Firelands Employees using that Black Rock Channel? A. I haven't seen any.

Q. You have seen Dunbar & Sullivan's employees? A. Yes.

Q. You've seen Darlings employees attempt to gain access to the Dunbar & Sullivan Barge, isn't that correct? A. Yes.

Q. You have a dispute with these people, Dunbar & Sullivan or Darling? [139] A. No.

Q. Why are you picketing in the water? A. As I stated, there's a possibility that they'll be using the access route.

Q. Now, I assume you testified to the fact that you were present at one of the picket boats, I believe, on what is it, November 14th? Was that correct or was it the 16th?

Mr. Lipsitz: The 17th.

*T. M. McPartlan, for Respondent, Cross.*

Mr. Novak: The 17th?

Mr. Lipsitz: According to the testimony.

Q. (By Mr. Novak) Isn't it a fact that before the Dunbar & Sullivan Barge came up the channel, that you were on the bank of the island before that, that you were not navigating the waters prior to that time, isn't that correct? A. I was in the boat all morning.

Q. Where were you on the boat? You were docked to Squaw Island, isn't that correct? A. Yes, we came there to get fuel and change people in the boat.

Q. I'm asking you, before you saw . . . before you saw that Dunbar & Sullivan barge came up there, your boat was docked on Squaw Island, isn't that correct? You weren't taking a cruise ride before that, were you, [140] up and down the Black Rock Channel?

Judge Johnston: Is this a tug boat?

The Witness: Tug boat.

Mr. Novak: Excuse me. Tug boat.

The Witness: No, not before I saw the tug boat, no.

Q. (By Mr. Novak) Why, upon seeing the tug boat, did you decide to take a ride out in the Black Rock Channel? A. I didn't see the tug boat before I decided to take a ride out into the channel.

Q. How big is the tug boat? A. It's the size of a boat.

Q. Was he tooting his horn when he went through the West Ferry Street Bridge? A. I don't know.

Q. Don't they usually? A. I guess they do.

Q. Doesn't that bridge go up? A. Yes, it does but I wouldn't want . . .

\* \* \*

*T. M. McPartlan, for Respondent, Cross.*

[141] Q. Nobody's ever prohibited you from picketing right at the Authority's Gate? The Sewer Authority hasn't prohibited you from picketing at the gate, have they? A. No.

Q. Isn't it a fact that you also have observed your picket boat moored to the Dunbar & Sullivan Barge when it was there? A. Yes, I did.

\* \* \*

[145] Q. (By Mr. Roach) Mr. McPartlan, can you tell this [146] Court whether it was your intention by your picketing in that channel to prevent Dunbar & Sullivan or Darling from working on this job? A. It was not my intent, no.

Q. Do you know it's had that effect? A. Yes, I guess I do.

\* \* \*

#### [147] EXAMINATION

Q. (By Mr. Judge Johnston) On the Authority's Access Road to the north, is this an open road going to the island? Is it open to the public? A. Yes, your Honor.

Q. And there's no control of access onto the island from that road? A. No, your Honor, there isn't.

Q. Now the Authority's Gate and Building shown on General Counsel's Exhibit No. 3, as I understand from prior testimony, there's a gate there, is that correct? A. Yes, there is.

Q. Is the island beyond that gate opening going north? Can anyone go through there if they want to? A. I can't say for sure if it's open to the general public ... yes.

Q. Does the gate remain closed during the day? A. At times it's closed. I think when the Authority isn't working.

Q. But at other times it remains open? A. I know particularly during the week it's always open and when we picket on Saturday, Sunday, sometimes [148] it's closed.

\* \* \*

*J. J. Mann, for Respondent, Direct.*

JAMES J. MANN, was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Lipsitz) Mr. Mann, I show you a document which has been received into evidence as General Counsel's Exhibit 4 and ask you if either figure on [149] there represents you? A. Yes.

Q. Which one? A. Up in here in the front of the boat.

Q. Who's the man at the other end of the boat? A. Harry Gerlach.

Q. Where's he now? A. Hunting.

\* \* \*

Q. (By Mr. Lipitz) On this photograph apparently it was taken—withdraw that. This photograph, apparently, appeared in the Buffalo News on the 15th of [150] November. Were you in that motor boat on the 14th in the channel picketing? A. Yes, it was on Wednesday.

\* \* \*

Q. (By Mr. Lipsitz) Okay. Does this photograph fairly represent the condition of the boat when you were picketing on the 14th? Was there a sign up there and Mr. Gerlach? A. Yes.

Q. It looks like it was the 14th or 15th? A. Yes. But I know what day the Courier Express come down. It was a Wednesday.

Q. So it was a Wednesday that this was taken? A. Yes.

Q. Now, on that Wednesday did you see a Dunbar & Sullivan tug come to the area where your boat was? A. It came through the bridge.

Q. And where was your boat at the time it came through the bridge? A. In the channel moving east and west.



*J. J. Mann, for Respondent, Direct.*

[151] Q. What time of the day was that? A. Say sometime in the morning.

Q. Before noon, is that what you mean? A. Before noon. If I remember it was before noon.

Q. What else had you been doing that day in the boat, if anything? A. Picketing up and down the channel all day.

Q. You said just before that you had been picketing east and west. A. Yes.

Q. Up and down the channel is north and south? A. Yes.

Q. Had you been doing that also that day? A. Yes.

Q. Now, how was your attention called to the tug when you observed it coming through on that date, on the 14th? A. We had pulled out away from the dock after I fueled the boat up and we got out in the channel and we could see the boat coming up the channel.

Q. You had just fueled your motor boat? A. Yes.

Q. And where was the fuel located? A. Up on—there's a set of stairs just by the Ferry Street Bridge that we used to go up and down on.

[152] Q. Is that on the island side? A. On the island side.

Q. Is that the most convenient place to moor? A. It's the only place we can fuel.

Q. You were then proceeding across the channel, is that correct? A. Yes.

Q. And when you saw the tug, what did you do? A. Turned the boat around to get out of its way.

Q. What's the comparison in size between the boat that you were in and the tug? A. Well, I got a ten foot aluminum boat. I don't know how big the tug is. It's big.

Q. Is it two times as large? A. It's a lot more than three times—maybe 20 times as large.

Q. And you moved to get out of the way. Did you hear any words from anybody on the tug? A. Yes, some guy hollered at me off the front of the tug.

*J. J. Mann, for Respondent, Direct.*

Q. Do you know who that guy was? A. No.

Q. Do you see him anywhere in the room? A. No, but somebody told me who he was.

Q. But you didn't know at the time? [153] A. No.

Q. What were the words you heard him say? A. He said, "Are you picketing union contractors?" and "I got a union contract."

Q. What did you say? A. I said, "No, I'm picketing Firelands."

Q. What else did you say? A. That's all.

Q. Did you make any gestures of any kind? A. We pointed to the sign on the side of the boat.

Q. Who pointed to it? A. Me or the guy in the back of the boat. I think I did.

Q. And was that the sign that appears in General Counsel's No. 4 on the upright position in the middle of the boat?

A. Yes, it's got a pull on it.

Q. Is that the way it was that day? A. As far as I remember it is.

Q. Do you recall if any other words were said by you or the other man in the boat that day? A. No, I don't.

Q. There's been testimony that somebody on that boat, the person was identified as the one being in front of the boat which. . . [154] A. That would be me.

Q. Stating in answer to the following question: "Are you picketing us" or "Are you picketing this company?" Referring to Dunbar and Sullivan's tug. Did you hear any such question? A. No, I heard him say, "Are you picketing a union contract?" And "We're a bonafide union contractor" and I said, "No, we're picketing Firelands." That's all I heard.

Q. Did you ever say you were picketing Dunbar & Sullivan or any other company? A. No.

\* \* \*

*J. J. Mann, for Respondent, Cross.*

[156] CROSS EXAMINATION

Q. (By Mr. Novak)

\* \* \*

[157] Q. Okay. Did you witness the tug turn around and go back, sir? A. Yes, I did.

Q. What did you people do after that? A. Went back and forth across and then we went back up by the work area.

Q. You're sure you didn't dock? A. No, I didn't. If I did, I don't remember.

Q. You're positive of that? [158] A. As well as I can be.

Q. Your testimony is that after that tug turned around, you went up and down the channel; you did not dock, is that correct, sir? A. As far as I remember, I don't think we did.

Q. Okay. On the incident when the tug approached the dock on the 16th, why, instead of patrolling the Black Rock Channel in a northerly-southerly direction, why did you . . . you positioned your boat in between the dock and the tug boat, sir, isn't that right? A. I positioned my boat or got out of the way of the tug.

Q. You can get out of the way of the tug by just going straight down the channel but decided instead. . . A. It was coming straight down the channel. It was coming south along side of the thing. I told you we were circling that barge.

Q. You were not north of the dock before the Dunbar & Sullivan Barge came up the channel, isn't that correct, before? A. I could have been. I was riding there all morning. I could have been in any position around the docks there. And when the tug came up, I pulled over to the side. You don't want to get hit with the back wash with them little boats.

[159] Q. Do you recall the gentleman talking to you on the 14th from the front of the tug? A. Yes, I do.

*J. J. Mann, for Respondent, Cross.*

Q. Do you recall him asking you whether this was a picket line? A. No, I don't.

\* \* \*

[160] CROSS EXAMINATION

Q. (By Mr. Roach) Mr. McPartlan, before you had this conversation, do I understand that you were trying to get away from this tug? A. I had fueled up the boat and I proceeded back out into the channel.

Q. All right. A. That's when I spotted the tug coming through the bridge.

Q. And then you were trying to get away from the tug? A. Yes. I was on the other side of the channel. I turned to get away from the tug.

Q. And you were trying to get away from it at the time of this conversation? A. That's when the guy yelled at me.

Q. Okay. And which way were you headed when you had this conversation? A. I think it was pointed back towards—on an angle [161] back to Squaw Island.

Q. So that would be on an angle towards the northwest, is that right? A. Right.

Q. And how much distance would you say there was between your boat and the tug when you had this conversation? A. I don't know how far we were. Far enough maybe 100 feet, 50 feet or whatever voices would carry back and forth.

Q. You had no trouble hearing him? A. No.

\* \* \*

*J. J. Mann, re-called for Respondent, Direct.*

[168] **Excerpts of Stenographic Transcript of  
Testimony at Hearing, November 20, 1973.**

\* \* \*

[170] **PROCEEDINGS**

\* \* \*

JAMES J. MANN, was recalled as a witness by and on behalf of the [171] Respondent and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Judge Johnston: You might develop on the record he's the same witness.

Q. (By Mr. Lipsitz) You're the same Mr. Mann that testified yesterday? A. Yes.

Q. Mr. Mann, yesterday you testified that after the conversation with the man on the tug on Wednesday the 14th, as to what you and the boat did, do you recall so testifying? A. Yes.

Q. Do you wish to correct that testimony now as to what happened after the conversation? A. Yes, because—

Q. You want to correct it? A. Yes.

Q. Tell us now what you recollect was the direction and what the boat did after the conversation. A. Well, after the tug went through the bridge, we turned the boat back from the other side of the creek towards Squaw Island. We were all going to go up like we usually do on patrol and the pickets on the land called us over and they showed us they were [172] taking movies from the end of the bridge and didn't know who they were and asked us if we saw them.

Q. And after that what did you do? A. After that, we went back up to the channel.

Mr. Lipsitz: I have no further questions.

*J. J. Mann, re-called for Respondent, Cross, Re-cross.*

Judge Johnston: Do you have any cross examination?

#### CROSS EXAMINATION

Q. (By Mr. Novak) You say the pickets on the land motioned you over to the— A. Yes.

Q. Your back would have been facing the bank, would it not, at that time, according to— A. That picture was taken a long time after this accident that you're talking about.

Q. Well, your back would have been facing the front of the boat, is that correct? A. No. We had started up towards the river and we made our turn. We are like at an angle and the guys on the shore hollered and waved us in. We went that far and went and came over to see what they wanted.

Q. Mr. Mann, why has your testimony changed today? You testified yesterday you went up the channel. For what reason did you change your testimony today? A. Because I forgot that we were called over until Harry and I were talking this morning.

\* \* \*

#### [173] RE-CROSS EXAMINATION

Q. (By Mr. Roach) When did you first learn that there was a movie camera there? [174] A. When we got back on the shore after the pickets called us in.

Q. You didn't tell us anything yesterday about a movie camera. A. I forgot about it.

Q. Did you forget about the movie camera yesterday, Mr. Mann? A. Yes.

\* \* \*

Q. (By Mr. Roach) Yesterday, sir, did you remember that there was a movie camera up there? A. No, I didn't.

\* \* \*

*H. Gerlach, for Respondent, Direct.*

Whereupon,

[175] HARRY GERLACH was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

Judge Johnston: Have a seat.

#### DIRECT EXAMINATION

Q. (By Mr. Lipsitz) Mr. Gerlach, are you a member of the Operating Engineers Local 17? A. Yes.

Q. And have you, during the picketing activities at the Squaw Island, participated in such activities? A. Yes.

Q. More specifically were you ever on a boat engaged in picketing activity? A. Yes.

Q. I show you an exhibit in this case which is designated General Counsel's Exhibit No. 4 which purports to be a photograph appearing in the Buffalo Courier Express on Thursday, November 15, 1973, and ask you to look at it and after you've looked at it, tell me, can you identify the people who are depicted? A. That's myself running the motor and Jim Mann with the sign up.

Q. And were you and he in those relative positions [176] last Wednesday, the 14th of November in the picket boat? A. Yes.

Q. Do you recall the time that day when a tug came close to where your boat was and when there was some conversation emanating from the tug? A. Yes there was.

Q. Do you recall that? A. Yes.

Q. What had the picket boat been doing just prior to the tug coming, if you recall? A. As far as I recall, I was—I don't even know what time of the morning it was but I had been out in the boat myself going up and down and I was running out of fuel and I went back. We had to relieve each other. Sometimes we'd have one or two. If it was cold weather, we relieved each other if it was cold. We went over, picked up

*H. Gerlach, for Respondent, Cross.*

Jim, got some fuel, and started out again when the tug was coming.

Q. Do you recollect any words that you heard at that point in time either from the tug or from your boat? Do you have any recollection of any words? A. I only heard—

Q. Do you have a recollection of some words? A. Yes.  
[177] Q. Tell us what you recollect that you heard, telling us everything that you recollect you heard? A. Well, I heard some conversation back and forth. I didn't say a thing. I was running the motor and the only words that I really remember that I heard, the last ones were someone on the tug—and I don't know who it was or anything—yelled that—said, "Are you picketing a bona fide union company," or "outfit" or something and I heard Jim answer, "No, we're picketing Firelands" and there was other conversation prior to that that I couldn't tell you what was said.

Q. Do you recall any conversation after that? A. No, not between the boat and the tug.

\* \* \*

## [178] CROSS EXAMINATION

Q. (By Mr. Novak) Mr. Gerlach, prior to seeing the tug, you testified that you were being fueled up, is that right, or in the process of having your boat fueled up? A. Yes.

Q. Did you see the tug while you were filling your boat up? A. Yes, shortly right then.

Q. Before you left the shore you saw the boat? A. Possibly, yes. I guess so because—I don't know.

Q. Why did you proceed into the channel after the seeing of the tug while you were on the shore, why [179] did you do this, sir? A. Well, we started to go out—please say that again.

Q. From your testimony now, you believe that you were—you saw the tug while you were in the process of filling up or shortly thereafter, but while you were still on the bank of the island. Why did you proceed into the channel then



*H. Gerlach, for Respondent, Cross.*

upon seeing the tug? A. So that the tug would be sure to see our picket sign.

Q. You operated the motor on the picket boat, sir? A. Yes, sir.

Q. Was that your intention, to have these tugs see your picket sign or your boat, your instructions from Mr. McPartlan or Mr. Chaffee? A. Yes. We were just patrolling up and down in front of the—

Q. You were told to have your picket boat be seen by the Dunbar & Sullivan people, is that correct? A. It wasn't necessarily for anybody. We were just picketing up and down in the boat so that it could be seen from the water. That's—

Q. Okay. You operated the boat is that correct? A. Yes, sir.

Q. Is that motor loud on the boat, on your boat? [180] A. It's a 1941 Johnson Outboard Motor. If you're familiar with—

Q. Is it loud? A. Yes, loud enough.

Q. Was Mr. Mann in a better position to hear what was said than you were? A. Yes.

Q. But you sure you heard Mr. Mann reply, "No, sir," to a question asked, "Are you picketing this non-union contractor..."

Mr. Lipsitz: No, no. I object to that.

Q. (By Mr. Novak) I mean, "picketing this bona fide union contractor", excuse me. A. I'm pretty sure that the only words I heard him clearly say, "No, we're picketing Firelands."

Q. But you're not really sure then? A. No. I couldn't truthfully say—I mean I won't say that I definitely heard that because I didn't hear the rest, the other stuff—I was having trouble with the motor and it was running, the tug was making noise.

\* \* \*



AFFIDAVIT OF SERVICE BY MAIL

State of New York ) RE: N. L. R. B.  
County of Genesee ) ss.: v  
City of Batavia ) International Union of Operating Engineers,  
Local No. 17 et al  
Docket No. 74-2045

I, Leslie R. Johnson being  
duly sworn, say: I am over eighteen years of age  
and an employee of the Batavia Times Publishing  
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On the 29 day of October, 19 74  
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Leslie R. Johnson

Sworn to before me this

29 day of October, 19 74

Monica Shaw

MONICA SHAW  
NOTARY PUBLIC, State of N.Y., Genesee County  
My Commission Expires March 30, 1975